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## The Interrogations of Brendan Dassey

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# THE INTERROGATIONS OF BRENDAN DASSEY

BRIAN GALLINI\*

*On March 1, 2006, a pair of detectives interrogated sixteen-year-old Brendan Dassey—one of two defendants prominently featured in the 2015 Netflix series *Making a Murderer*—for several hours about his role in the October 31, 2005, disappearance of photographer Teresa Halbach. The prosecution introduced statements obtained during that interrogation at Dassey’s trial. With no corroborating physical evidence, those statements—including that Dassey cut Halbach’s throat—played a significant role in his conviction for Halbach’s murder.*

*Following his conviction, Dassey’s appellate arguments about the legitimacy of his confession focused on his March 1, 2006, confession. Most recently, his petition for a writ of certiorari before the U.S. Supreme Court argued that the March 1 confession was involuntary and that using it against him at trial violated the Fourteenth Amendment’s due process clause.*

*But the value of Dassey’s case for educational purposes involves much more than just a voluntariness issue. Dassey’s case presents other more fruitful grounds for challenging his conviction that were either not preserved by his earlier lawyers or were subjected to severely flawed judicial analysis. This Article therefore argues that Dassey’s case provides a special educational opportunity for law schools thanks to the international attention on his case and the *Making a Murderer* documentary. Stated differently, this Article argues that Brendan Dassey’s story is the consummate teaching opportunity.*

*This Article proceeds in three parts. Part II offers a brief primer on Dassey’s case before discussing the interrogation methods that officers used on Dassey over the course of numerous different interrogations from November of 2005 to March of 2006. Then, Part III discusses with specificity how Dassey’s interrogations demonstrate the need for law schools to teach interrogation methods to students. Finally, Part IV explores why the Wisconsin appellate judiciary concluded that Dassey’s pretrial lawyer, Len Kachinsky, provided constitutionally competent*

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*defense representation despite failing to preserve several critical issues. Dassey's case illustrates a harsh reality for students: poor lawyering passes muster for Sixth Amendment purposes.*

|   |     |
|---|-----|
| I. INTRODUCTION .....                                     | 778 |
| II. ....  | 783 |
| A. A Primer on the Dassey Case.....                       | 783 |
| B. Why Interrogation Methods Belong in the Classroom..... | 786 |
| C. Understanding the Reid Technique.....                  | 788 |
| 1. Interview vs. Interrogation.....                       | 789 |
| 2. False Confessions .....                                | 790 |
| III.....  | 791 |
| A. The November 6, 2005 Interrogation.....                | 792 |
| B. The February 27, 2006 Schoolhouse Interrogation.....   | 796 |
| C. The February 27, 2006 Stationhouse Interrogation.....  | 801 |
| D. The March 1, 2006 Stationhouse Interrogation.....      | 806 |
| 1. Custody.....   | 808 |
| 2. The Reid Method Persists .....                         | 809 |
| 3. Waiver.....  | 811 |
| 4. An Unconsidered Legal Consequence .....                | 814 |
| IV.....   | 816 |
| A. A Primer on Attorney Performance .....                 | 817 |
| B. Kachinsky's Representation.....                        | 820 |
| C. Len Kachinsky Is the New William Tunkey .....          | 829 |
| V. CONCLUSION .....                                       | 837 |

## I. INTRODUCTION

On November 6, 2005, a pair of detectives interrogated sixteen-year-old Brendan Dassey—one of two defendants prominently featured in the 2015 Netflix series *Making a Murderer*—for nearly an hour about his role in the October 31, 2005, disappearance of photographer Teresa Halbach.<sup>1</sup> Interrogations, or “interviews” as law enforcement termed several of them,<sup>2</sup> followed on November 10, 2005, three times on February 27, 2006, and again

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1. *Making A Murderer: Plight of the Accused* (Netflix 2015), <https://www.netflix.com/title/80000770> [<https://perma.cc/J379-WCXB>] [hereinafter *Plight of the Accused*].

2. Transcript of Motion Hearing at 14, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. May 4, 2006).

on March 1, 2006.<sup>3</sup> The prosecution introduced at trial the incriminating statements obtained from Dassey during the March 1 interrogation;<sup>4</sup> in other words, the end product of the prior five interrogations. With no corroborating physical evidence,<sup>5</sup> those statements—including that Dassey cut Halbach's throat<sup>6</sup>—played a significant role in his conviction for the murder of Teresa Halbach.<sup>7</sup>

To say that law enforcement's interrogations of Dassey received substantial media criticism would be an understatement.<sup>8</sup> In particular, the interrogators were highly criticized for utilizing the Reid Technique<sup>9</sup>—a leading

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3. See generally Brief of Defendant–Appellant at 7, *State v. Dassey*, 2013 WI App 30, 346 Wis. 2d 278, 827 N.W.2d 928 (No. 2010AP3105); Transcript of Brendan Dassey Mishicot High School Interview, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Feb. 27, 2006); Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Feb. 27, 2006); Transcript of Trial Day 5 at 10–11, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2007); Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Mar. 1, 2006).

4. See generally Transcript of Trial Day 5, *supra* note 3, at 5.

5. *Id.* at 103.

6. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 586.

7. See generally *Dassey*, 2013 WI App 30; Transcript of Post-Conviction Motion Hearing Day 1 at 6, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2010).

8. Matt Ferner, *7 Terrifying Things 'Making a Murderer' Illustrates About American Justice*, HUFFINGTON POST (Dec. 19, 2016), [https://www.huffingtonpost.com/entry/making-a-murderer-criminal-justice\\_us\\_5699952de4b0b4eb759e8757](https://www.huffingtonpost.com/entry/making-a-murderer-criminal-justice_us_5699952de4b0b4eb759e8757) [https://perma.cc/NY59-VF7M]; Kathryn Schulz, *Dead Certainty*, NEW YORKER (Jan. 25, 2016), <https://www.newyorker.com/magazine/2016/01/25/dead-certainty> [https://perma.cc/MJ8L-VRGN]; Christina Sterbenz, *A Recurring Problem in 'Making a Murderer' Used to Be Huge in the UK—and the Country Figured out How to Fix it*, BUS. INSIDER (Jan. 16, 2016, 9:21 AM), <https://www.businessinsider.com/making-a-murderer-problem-steven-avery-2016-1> [https://perma.cc/SLY3-9W3E]; Matt McCall, *'Making a Murderer' Raises Questions About Interrogation Technique from Chicago*, CHI. TRIB. (Jan. 7, 2016, 10:23 PM), <https://www.chicagotribune.com/news/local/breaking/ct-reid-confession-technique-met-20160106-story.html> [https://perma.cc/FYT2-QX6R].

9. Matt Masterson, *What Leads to False Confessions? 'Making a Murderer' Attorneys Weigh In*, CHI. TONIGHT (Sept. 29, 2017, 1:30 PM), <https://chicagotonight.wttw.com/2017/09/29/what-leads-false-confessions-making-murderer-attorneys-weigh> [https://perma.cc/648H-3TPD]; Tanya Lewis, *Here's How False Confessions—Like the One Brendan Dassey Allegedly Gave on 'Making a Murderer'—Happen*, BUS. INSIDER (Feb. 5, 2016, 3:11 PM), <https://www.businessinsider.com/making-a-murderer-and-the-science-of-false-confessions-2016-2> [https://perma.cc/ZU5C-CCVG]; Duke Behnke, *Attorney: Dassey Confession 'Contaminated'*, POST CRESCENT (Jan. 16, 2016, 7:47 AM), <https://www.postcrescent.com/story/news/local/steven-avery/2016/01/16/attorney-dassey-confession-contaminated/78744222/> [https://perma.cc/JTU5-DCAN].

interrogation method<sup>10</sup>—on a juvenile suspect.<sup>11</sup> Use of that interrogation method, as many have observed, is at the heart of several documented false confessions.<sup>12</sup>

Popular media aside, though, Dassey's appellate arguments about the legitimacy of his confession have focused on his March 1, 2006, confession. Most recently, his petition for a writ of certiorari before the U.S. Supreme Court argued that the March 1 confession was involuntary and that using it against him at trial violated the Fourteenth Amendment's due process clause.<sup>13</sup>

The value of Dassey's case for educational purposes involves much more than the voluntariness issue. That issue appropriately gained prominence because it was the issue presented for review to the Supreme Court.<sup>14</sup> Dassey's

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10. Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 536 (2010) ("A recent nationwide survey of police departments revealed that two-thirds of state police departments train some or all of their department's officers in the Reid method.").

11. The Times Editorial Bd., *Juveniles Are Owed Special Protection from Police Coercion. Brendan Dassey Should Serve as that Reminder*, L.A. TIMES (June 21, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-juvenile-confession-20180621-story.html> [<https://perma.cc/KN7J-BSSW>]; Jane Kelly, *UVA Expert: 'Making a Murderer' Proves Juvenile Interrogations Must Change*, UVA TODAY (June 13, 2018), <https://news.virginia.edu/content/uva-expert-making-murderer-proves-juvenile-interrogations-must-change> [<https://perma.cc/GVH5-FAC9>]; Adam Liptak, *Was It a False Confession in 'Making a Murderer'? The Supreme Court May Decide*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/supreme-court-making-a-murderer.html> [<https://perma.cc/CVA4-8YAG>]; Brandon Garrett, *Brendan Dassey's False Confession Shows We Need to Be More Careful when Interrogating Juveniles*, USA TODAY (June 9, 2018, 7:00 AM), <https://www.usatoday.com/story/opinion/policing/2018/06/09/brendan-dasseys-false-confession-supreme-court-column/652915002/> [<https://perma.cc/AFB9-P7F7>]; MPR News Staff, *How 'Making a Murderer' Exposes Flaws in Juvenile Justice System*, MPR NEWS (Feb. 1, 2016), <https://www.mprnews.org/story/2016/02/01/making-a-murderer-exposes-flaws-in-juvenile-justice-system> [<https://perma.cc/8FM8-QA86>].

12. Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. FOR SOC. JUST. 301, 315–16 (2017); Megan Crane et al., *The Truth About Juvenile False Confessions*, INSIGHTS ON L. & SOC'Y, Winter 2016, at 10, 10–13 (2016), [https://www.americanbar.org/content/dam/aba/images/public\\_education/insights/Juvenile\\_confession\\_s.pdf](https://www.americanbar.org/content/dam/aba/images/public_education/insights/Juvenile_confession_s.pdf) [<https://perma.cc/6EYD-J3EJ>]; Robert Kolker, *Nothing but the Truth*, MARSHALL PROJECT (May 24, 2016), <https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth> [<https://perma.cc/4LRB-NNZV>].

13. Petition for Writ of Certiorari at 17, 23–30, *Dassey v. Dittmann*, 138 S. Ct. 2677 (2018), *cert. denied*, (No. 17-1172).

14. Douglas Starr, *In the "Making a Murderer" Case, the Supreme Court Could Help Address the Problem of False Confessions*, NEW YORKER (June 6, 2018), <https://www.newyorker.com/news/news-desk/in-the-making-a-murderer-case-the-supreme-court-could-help-address-the-problem-of-false-confessions> [<https://perma.cc/W5QT-JNVM>]; Andy Thompson, *Dassey Appeal: Videotaped Confession Emerges as Key Issue in U.S. Supreme Court Petition*, POST CRESCENT (June 4, 2018, 10:25 AM),

case, though, presents other perhaps more fruitful grounds for challenging his conviction that were either not preserved by his earlier lawyers or were subjected to severely flawed judicial analysis.<sup>15</sup> Most critically, one of Dassey's first lawyers failed to preserve critical *Miranda*-based arguments related to custody, waiver, and the impact of using adult interrogation methods on juvenile suspects.<sup>16</sup> Although those and related issues are unavailable for legal disposition, Dassey's case provides a special educational opportunity for law schools thanks to the international attention of his case and the *Making a Murderer* documentary.

The question shifts, then, to *how* the legal academy might better engage students in the critical topics raised by Dassey's case—including the role of false confession literature and jurisprudence. To begin with, it starts with making the investigative criminal procedure course real for students. Too often the books law schools teach from and the lectures professors give deal in hypotheticals. What happened to Dassey, though, is not a hypothetical. And sadly, his case is far from an anomaly.<sup>17</sup>

The upshot of Dassey's case is that law students know who Dassey is and they are eager to learn how he was convicted. This Article argues that his case is the consummate teaching opportunity. It proposes how law professors might use the diverse range of issues raised specifically by Dassey's case to better

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<https://www.postcrescent.com/story/news/2018/06/04/brendan-dasseys-confession-key-focus-u-s-supreme-court-case/663874002/> [<https://perma.cc/JZ2Z-A96Y>]; Leah Litman, *Making A Murderer Makes its Way to the Supreme Court*, TAKE CARE (May 29, 2018), <https://takecareblog.com/blog/making-a-murderer-makes-its-way-to-the-supreme-court> [<https://perma.cc/KT7Z-KAVK>]; Leah Litman, *SCOTUS Term: Making A Murderer Makes its Way to the Supreme Court*, PRAWFSBLAWG (May 29, 2018, 6:47 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2018/05/scotus-term-making-a-murderer-makes-its-way-to-the-supreme-court.html> [<https://perma.cc/SV95-LQKQ>].

15. *E.g.*, *State v. Dassey*, 2013 WI App 30, ¶¶ 13–22, 346 Wis. 2d 278, 827 N.W.2d 928 (rejecting Dassey's ineffective assistance of counsel claim in a mere nine paragraphs).

16. Brief of Defendant–Appellant, *supra* note 3, at 38–39, 57.

17. David Boeri, *How a Teen's Coerced Confession Set Her Free*, NPR (Dec. 30, 2011, 3:22 PM), <https://www.npr.org/2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free> [<https://perma.cc/4274-G8JA>]; Gretchen Gavett, *A Rare Look at the Police Tactics that Can Lead to False Confessions*, FRONTLINE (Dec. 9, 2011), <https://www.pbs.org/wgbh/frontline/article/a-rare-look-at-the-police-tactics-that-can-lead-to-false-confessions/> [<https://perma.cc/AV3A-M6B3>].

educate students in the investigative criminal procedure course—a course tested routinely on the bar exam<sup>18</sup> and taught in law schools nationwide.<sup>19</sup>

This Article proceeds in three parts. Part II offers a brief primer on Dassey's case before discussing the interrogation methods that officers used on Dassey over the course of numerous different interrogations from November of 2005 to March of 2006. Then, Part III discusses with specificity how Dassey's interrogations demonstrate the need for law schools to teach students about interrogation methods. Dassey's various interrogations illustrate some of the complex ways that law enforcement interrogation tactics impact application of *Miranda* doctrine. Demonstrating the disconnect between doctrine and police tactics is important because so many students will be tasked in their careers with identifying legal issues from interrogation videos or interrogation transcripts.

Finally, Part IV considers why the appellate judiciary concluded that Dassey's pretrial lawyer, Len Kachinsky, provided constitutionally competent defense representation despite failing to preserve several viable issues. Part IV blames the Supreme Court's decision in *Strickland v. Washington*, which since 1984 has offered the governing measuring stick for competent defense attorney performance. Dassey's case illustrates a harsh *Strickland* reality for students: poor lawyering passes muster for Sixth Amendment purposes. Because *Strickland* demands so little from defense lawyers, law schools must fill the gap and demand more from students. Dassey's case, and Kachinsky's lawyering,

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18. Most notably, criminal procedure is tested on the Uniform Bar Exam. 2018 MEE Subject Matter Outline, MULTISTATE ESSAY EXAMINATION, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F183> [https://perma.cc/353J-VB8S]. The Uniform Bar Exam is currently administered in thirty-four jurisdictions nationwide. *Jurisdictions that Have Adopted the UBE*, NAT'L CONF. BAR EXAMINERS, <http://www.ncbex.org/exams/ube/> [https://perma.cc/2VR5-XF7E] (last visited Aug. 24, 2018); see *Law School Classes that Will Prepare You for the Bar Exam: What to Take and What Not to Take!*, JD ADVISING (Aug. 6, 2015), <https://www.jdadvising.com/law-school-classes-that-will-prepare-you-for-the-bar-exam-what-to-take-and-what-not-to-take/> [https://perma.cc/44LE-ULVV] (listing criminal procedure as an essential law school class).

19. See, e.g., *Certificate in Criminal Law*, U. ARK. SCH. LAW, <https://catalog.uark.edu/lawcatalog/criminallawcertificate/> [https://perma.cc/RP67-SZBB] (last visited Aug. 16, 2018) (requiring Criminal Procedure I); *Criminal Law, Justice & Policy Concentration*, TEX. A&M U. SCH. LAW, <https://law.tamu.edu/prospective/academics/concentrations/criminal-law-justice-policy> [https://perma.cc/U566-MEVA] (last visited Aug. 16, 2018) (requiring Criminal Procedure and Criminal Procedure Trial Rights); *Criminal Law Concentration*, U. MISS. SCH. LAW, <https://law.olemiss.edu/academics-programs/concentration-programs/criminal-law-concentration/> [https://perma.cc/6VA3-X4XJ] (last visited Aug. 16, 2018) (requiring Criminal Procedure I). Sure, faculty might be interested in teaching a standalone course about Avery and Dassey, but reaching the broader audience of students who enroll in the criminal procedure courses is more salient.

collectively demonstrate what happens when the judiciary permits bad lawyering.

## II.

The State of Wisconsin's investigation into the disappearance of photographer Teresa Halbach led to charging two defendants, Brendan Dassey and Steven Avery, with Halbach's murder. Section A of this Part broadly sketches Dassey's involvement in Halbach's death. It also previews the several Dassey interrogations by simply outlining how many took place alongside when those interrogations took place. Section B then steps away from the Halbach case to briefly survey how interrogations take place. Given the frequency with which interrogations are a part of police investigations, Section B squarely asserts that students must learn about interrogation techniques while in law school. That contention helps to set the stage for Section C, which provides an overview of the Reid interrogation technique—the most widely used interrogation technique in the country.

### A. *A Primer on the Dassey Case*

Brendan Ray Dassey was born in Manitowoc County, Wisconsin, on October 19, 1989, to parents Barbara and Peter Dassey.<sup>20</sup> A brother to Bryan, Bobby, Blaine, and half-brother Brad, Brendan lived with his family in a trailer located on Avery Salvage—a forty-acre property that housed more than twelve buildings and roughly 4,000 junked automobiles.<sup>21</sup>

In the fall of 2005, Dassey was a sixteen-year-old student enrolled as a sophomore at Mishicot High School.<sup>22</sup> Apart from Dassey's intense desire to attend his classes,<sup>23</sup> he struggled in school. At the time photographer Teresa

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20. *Why Were the Averys So Unpopular?*, STEVEN AVERY CASE, <http://stevenaverycase.com/why-were-the-averys-so-unpopular/#sthash.zfJAgVEj.dpbs> [https://perma.cc/PKP9-N5PD] (last visited July 14, 2018).

21. Transcript of Trial Day 7 at 12–14, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2007); *Map of Avery Property*, STEVEN AVERY CASE, <http://stevenaverycase.com/#sthash.myLkIZMn.axJ1cjuj.dpbs> [https://perma.cc/XKU3-484H] (last visited July 14, 2018).

22. Transcript of Motion Hearing, *supra* note 2, at 65.

23. In the interrogation transcripts, Barb says that Brendan always wants to attend all of his classes. Moreover, Brendan asked the interrogators multiple times during his interrogations whether he would be done in enough time to attend his classes. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 479; Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 667; *Phone Call Brendan & Mom*, STEVEN AVERY CASE (May 13, 2006), [https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/5692fbafa128e6b30eb197ad/1452473263584/dassey\\_mom\\_5\\_13\\_06.pdf](https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/5692fbafa128e6b30eb197ad/1452473263584/dassey_mom_5_13_06.pdf) [https://perma.cc/L2EH-NKVP].



Halbach was reported missing on October 31, 2005, Dassey was enrolled in special education classes and was failing three of his courses.<sup>24</sup>

Dassey's limited academic capabilities have a history. He began receiving special education services almost a decade earlier—in 1996—after intelligence testing revealed a full scale IQ of 74 with a verbal IQ of 65 and performance IQ of 87.<sup>25</sup> Follow-up testing in 1999 indicated similar scores; his full scale IQ at the time was 73 with a verbal IQ of 69 and performance IQ of 82.<sup>26</sup> Three years later, in 2002, Mishicot School District School Psychologist Kris Schoenenberger-Gross evaluated Dassey for cognitive abilities,<sup>27</sup> which placed Dassey in the borderline to below average range.<sup>28</sup> In addition to reporting that Dassey suffered from a learning disability, she indicated that he was identified with a speech and language impairment and has difficulty expressing himself “as well as understanding some facets of language.”<sup>29</sup>

It is against that backdrop that Brendan was first questioned by law enforcement on November 6, 2005.<sup>30</sup> By then, the Manitowoc County Sheriff's Department's (MCSD) investigation into Halbach's disappearance had already focused on Avery Salvage and, in particular, Brendan's uncle, Steven Avery.<sup>31</sup> For many reasons, MCSD's focus on Avery was not surprising; after all, it thought Avery was the last one to see Halbach alive.<sup>32</sup> At a minimum, though, no one disputes that Halbach visited Avery on the Avery Salvage property on October 31 at approximately 2:30 p.m. to take pictures of a van Avery hoped to sell in Auto Trader magazine.<sup>33</sup> That visit, alongside Avery's three calls to

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24. Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives at 46, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Nov. 6, 2005); Transcript of Motion Hearing, *supra* note 2, at 66, 92, 94.

25. Transcript of Motion Hearing, *supra* note 2, at 85–86.

26. *Id.* at 87.

27. Schoenenberger-Gross relied on the Woodcock-Johnson III Test of Cognitive Abilities, which evaluates an individual's overall cognitive intelligence with a series of tests in the areas of Verbal Ability, Thinking Ability, and Cognitive Efficiency. Mary G. Rizza et al., *Profile Analysis of the Woodcock-Johnson III Tests of Cognitive Abilities with Gifted Students*, 38 PSYCHOL. SCHS. 447, 449 (2001).

28. Transcript of Motion Hearing, *supra* note 2, at 88–89.

29. *Id.* at 90–91.

30. Marinette Cty. Sheriff's Dept. Interview of Brendan Dassey at 1, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Nov. 6, 2005).

31. *Id.*

32. Marinette Cty. Sheriff's Dept. Interview of Steven Avery at 1, *State v. Avery*, 2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216 (No. 2010 AP 411).

33. *Id.*

Halbach on the day she disappeared, caused law enforcement to obtain a November 5 warrant to search Steven Avery's trailer and Avery Salvage.<sup>34</sup>

Skeptics have a different view of why law enforcement came to focus on Steven Avery. In July of 1985, Penny Beernsten was raped on a Lake Michigan beach and the Manitowoc County Sheriff's Department arrested Avery.<sup>35</sup> Avery was tried and convicted for Beernsten's rape,<sup>36</sup> despite his supported alibi that he was forty miles away at the time of the attack,<sup>37</sup> and sentenced to serve thirty-two years in prison.<sup>38</sup> DNA testing exonerated Avery eighteen years later and, following his release from prison in September of 2003, Avery sued the Manitowoc County Sheriff's Department for thirty-six million dollars<sup>39</sup>—a sum that MCSD could not afford.<sup>40</sup> By the time of Halbach's disappearance, Avery's civil litigation team had already productively completed a number of depositions and were scheduled to depose former Sheriff, and named defendant, Thomas Kocourek on November 10.<sup>41</sup> Some believed then, and still do, that MCSD investigated Avery—and shortly thereafter arrested him—to avoid exposure to potentially crippling financial liability.<sup>42</sup>

How Dassey came onto MCSD's radar followed a more intuitive path. On November 6, 2005, Avery Salvage was already in the hands of law enforcement as it began its second day of searching the large property.<sup>43</sup> At approximately 11:55 a.m., Marinette County detectives spotted two young men driving Steven

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34. *Steven Avery 10/31/2005 Phone Call Records*, STEVEN AVERY CASE, <http://stevenaverycase.com/steven-avery-phone-call-records#sthash.a37fHcSz.dpbs> [https://perma.cc/WMV4-AFSZ] (last visited July 14, 2018). See generally *Search Warrant, Avery*, 2011 WI App 124 (No. 2010AP411), <http://www.stevenaverycase.org/wp-content/uploads/2016/02/Nov-5-Search-Warrant-and-Affidavit-and-Return.pdf> [https://perma.cc/NZ6H-8NAP].

35. *State v. Avery*, 213 Wis. 2d 228, 230, 570 N.W.2d 573, 575 (Ct. App. 1997).

36. *Id.*

37. See *id.*

38. Wis. Dept. of Justice, *Correspondence/Memorandum Avery Review*, STEVEN AVERY CASE 2 (Dec. 17, 2003), <https://static1.squarespace.com/static/5691be1b25981daa98f417c8/t/56932cf3dc5cb46e49ddea08/1452485876920/DOJ+-+2003+Steve+Avery+Review+Memo.pdf> [https://perma.cc/9X2E-Y36H].

39. Complaint and Jury Trial Demand at 14, *Avery v. Manitowoc County*, No. 04 CV 986 (E.D. Wis. 2004).

40. See generally *Plight of the Accused*, *supra* note 1.

41. *Making a Murderer: Turning the Tables* (Netflix 2018), <https://www.netflix.com/title/80000770> [https://perma.cc/L49B-WTVX].

42. *Plight of the Accused*, *supra* note 1.

43. Transcript of Trial Day 1 at 48–49, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2007).

Avery's car—the subject of a separate search warrant—and stopped them.<sup>44</sup> After identifying the car's occupants as Steven's nephews, Bryan Dassey and Brendan Dassey, who were on their way to purchase Mountain Dew,<sup>45</sup> the detectives seized the vehicle and asked to speak with Bryan and Brendan separately.<sup>46</sup> The roadside conversation that followed constitutes the beginning of Brendan's long interrogation journey—a journey that culminated with his March 1, 2006, confession and subsequent conviction for participating in Halbach's murder for which he received a life sentence.

The *Making a Murderer* documentary explores only the March 1 confession. It neither addresses—nor even mentions—any of Dassey's other Reid interrogations. Dassey's interactions with law enforcement during those interrogations were critical contributors to his March 1 “confession.” The most notable of these are an interrogation that occurred on November 6, 2005, and three interrogations that happened on February 27, 2006. To appreciate what took place on those dates, though, some context for—and understanding of—interrogation methods is critical. We turn next to the most popular of those methods.

### B. *Why Interrogation Methods Belong in the Classroom*

At the core of Dassey's heart-breaking story is the Reid interrogation technique and the failure of investigators and his trial counsel alike to understand how that technique operates—both generally and specifically on the juvenile suspect.

The vast majority of American law enforcement deploy the same nine-step interrogation method developed and formalized over decades dating back to 1942.<sup>47</sup> The true effect of the Reid technique is difficult to appreciate until you understand the strategies underlying the method. That, in turn, matters to lawyers because it may drive when *Miranda* rights attach to a suspect—particularly when *Miranda* custody begins—as opposed to when *Miranda* should attach.

Inside law school classrooms, the investigative criminal procedure course often dedicates considerable time to *Miranda* jurisprudence. And appropriately so. But an understanding of *Miranda* is just one-half of the equation. Understanding interrogation methods alongside the accompanying social

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44. Marinette Cty. Sheriff's Dept. Interview of Brendan Dassey, *supra* note 30, at 1.

45. Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives, *supra* note 24, at 48.

46. Marinette Cty. Sheriff's Dept. Interview of Brendan Dassey, *supra* note 30, at 1.

47. FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 71–118 (1942) (outlining a series of techniques for criminal interrogations).

science literature is the other half. Law schools can help navigate the bridge between interrogation methods and the constitutional law that governs them.

I have had the privilege of teaching the investigative criminal procedure course consistently for the past decade. After teaching it a handful of times, my curiosity about some of the material's nuances grew. One nuance—or what I perceived to be a disconnect—stood out to me above all others: the relationship between interrogation methods and *Miranda v. Arizona*.<sup>48</sup> Across several pages of the *Miranda* majority, Chief Justice Warren extensively discusses interrogation manuals.<sup>49</sup> He even relied on their prevalence, in part, to justify the Court's creation of the now famous *Miranda* warnings.<sup>50</sup>

If interrogation methods were so important to the *Miranda* Court's holding, why wasn't I teaching them to students? And which method should I focus on?

Once again, *Miranda* had answers. Buried in the weeds of the *Miranda* opinion I rediscovered a handful of footnotes that, I confess, I had not previously focused on in prior classes. There, across more than ten footnotes, Chief Justice Warren cited heavily to *Criminal Interrogation and Confessions* by John E. Reid and Fred E. Inbau (Williams & Wilkins Company, 1962).<sup>51</sup> He even noted in a particular footnote that the Reid text “had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.”<sup>52</sup>

I was intrigued. In the summer of 2009, I dedicated myself to learning the method. Among many other things, I learned that the 44,000 figure Chief Justice Warren cites to describe the prevalence of the Reid text is dramatically out of date. Today, investigators learn interrogation techniques from a business—John E. Reid & Associates.<sup>53</sup> The prevalence of the Reid technique—as taught in seminars and described in *Criminal Interrogation and Confessions*—cannot be overstated. Indeed, John E. Reid & Associates is the largest, best-known provider of interrogation training in the United States.<sup>54</sup>

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48. 384 U.S. 436, 448–56 (1966).

49. *Id.*

50. *See id.*

51. *Id.* at 449 nn.9–10, 450 nn.12–13, 452 nn.15–17, 454–55 nn.20–23.

52. *Id.* at 449 n.9.

53. JOHN E. REID & ASSOCIATES, INC., [www.reid.com](https://perma.cc/VZZ4-9DH9) [https://perma.cc/VZZ4-9DH9] (last visited June 29, 2018).

54. *Training Programs*, JOHN E. REID & ASSOCIATES, INC., [www.reid.com/training\\_programs/r\\_training.html](https://perma.cc/7Z2T-TRVG) [https://perma.cc/7Z2T-TRVG] (last visited June 29, 2018).

Officers from every U.S. state use the Reid method.<sup>55</sup> A nationwide survey of police departments revealed that two-thirds of state police departments train some or all of their department's officers in the Reid method.<sup>56</sup> The Reid technique also claims international reach.<sup>57</sup> According to John E. Reid & Associates, participants in Reid training come from "every U.S. State and Canadian Province, as well as various countries in Europe, Asia and the Middle East."<sup>58</sup> The United States military law enforcement also relies on the technique.<sup>59</sup>

In total, Reid & Associates boasts that more than 500,000 law enforcement and security professionals have attended its interrogation seminars since they were first offered in 1974<sup>60</sup>—in other words, more than ten times the number who learned the technique in 1966 when *Miranda* was published.<sup>61</sup>

The prevalence of the Reid technique speaks for itself. But its pervasiveness hides a powerful reality: law enforcement and law students are learning from different playbooks. That is, law enforcement is learning an interrogation technique without necessarily focusing on the constitutional law that governs that technique. Meanwhile, law students are learning the governing law without learning the technique. That must change and, again, Dassey's case demonstrates why knowledge of the technique—as incorporated into a motion to suppress—could have meaningfully impacted the admissibility of his March 1, 2006, "confession."

### C. Understanding the Reid Technique

The Reid interrogation method is based on the *Criminal Interrogation and Confessions* book. The text is long. Now in its fifth edition, the authors provide 449 pages of instruction.<sup>62</sup> The most important thing to understand within that sea of text is that Reid teaches a two-part approach to questioning a suspect—the first part being an "interview" and the second being "interrogation."<sup>63</sup>

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55. *Id.*

56. Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 920 (2007).

57. *Training Programs*, *supra* note 54.

58. *Id.*

59. *Id.*

60. *Id.*

61. See *Miranda v. Arizona*, 384 U.S. 436, 449 n.9 (1966).

62. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 4 (5th ed. 2013).

63. *Id.* at 6–7.

Against the organization of the Reid technique lies its biggest criticism: use of the technique produces false confessions.<sup>64</sup>

### 1. Interview vs. Interrogation

The training manual begins by discussing a “behavior analysis interview” and distinguishing it from an “interrogation.”<sup>65</sup> According to Reid, an interview is a non-accusatory information gathering exercise where the examiner should ask a series of “behavior-provoking questions.”<sup>66</sup> From a suspect’s responses to those questions, the investigator “will generally be able to classify the overall responses to those questions as either fitting the description of an innocent or guilty suspect.”<sup>67</sup>

By contrast, a Reid *interrogation* commences “when the investigator is reasonably certain of the suspect’s guilt,” which certainty may arise from “the suspect’s behavior during an interview.”<sup>68</sup> It is at that point when, in a controlled environment, the interrogator should display an air of unwavering confidence in the suspect’s guilt and employ the nine-step Reid interrogation technique.<sup>69</sup>

Some steps in the confrontation-based Reid technique are more important than others. Step one, for example, directs the interrogator to “initiate the interrogation with a direct statement indicating absolute certainty in the suspect’s guilt.”<sup>70</sup> Step two directs the interrogator to begin “theme” development.<sup>71</sup> The theme should present the suspect with a moral—not legal—excuse for committing the offense.<sup>72</sup>

The first two steps and those that follow build to step seven. Once there, the interrogator asks the suspect an “alternative question,” which provides the suspect “a choice between two explanations for possible commission of the crime.”<sup>73</sup> No matter the answer, though, the suspect must offer an incriminating

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64. See, e.g., Naomi E. S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths’ Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 3 (2018); Kozinski, *supra* note 12, at 315–20; Tracy Hresko Pearl, *Fifty Years Later: Miranda & the Police*, 50 TEX. TECH L. REV. 63, 76 (2017).

65. INBAU ET AL., *supra* note 62, at 3–4.

66. *Id.* at 154.

67. *Id.* at 168.

68. *Id.* at 5.

69. *Id.* at 187.

70. *Id.* at 193.

71. *Id.* at 188.

72. *Id.*

73. *Id.* at 293.

response.<sup>74</sup> For example, in a theft case, the interrogator may ask “[d]id you blow that money on booze . . . or did you need it to help out your family?”<sup>75</sup> Once the suspect admits involvement in the particular crime, the remaining steps counsel investigators on how to obtain a fuller confession and reduce it to writing.<sup>76</sup>

When an officer shifts to the interrogation portion of Reid, the officer has made a direct assessment of guilt and is now proceeding to gather evidence to support guilt.<sup>77</sup> Problematically, *Miranda* may or may not have attached at that critical moment because the *Miranda* custody standard places insufficient weight on the officer’s decision about the suspect’s guilt. At a bare minimum, *Miranda* should apply the moment when an officer decides to pursue a confession using the nine-step Reid interrogation method. That’s not to say, though, that *Miranda* has no application to the behavior analysis interview. In some cases, it’s certainly possible for a suspect to be in custody at that time. In this way, the *Miranda* custody standard is simultaneously over- and under-inclusive.

## 2. False Confessions

There is much to discuss about the technique and the criticism it elicits. But one piece of critical feedback has persisted for years both in legal scholarship and popular media outlets alike: the Reid method produces false confessions.<sup>78</sup>

Hoping to form my own opinion about this criticism, I attended Reid training last year. I learned a lot. I now both agree and disagree that the Reid method produces false confessions. Here is the scene: It’s me and roughly forty members of law enforcement from varied backgrounds crammed in a medium-sized hotel ballroom in May 2017 in downtown Atlanta. I’m the only unarmed attendee.

Over the course of several days, I learned insider Reid techniques related both to interviewing and interrogating, including how to identify verbal and non-verbal behavior indicative of truth or deception, how to move from an interview to an interrogation, and how to develop crime-specific interrogation themes. I also learned that, if you know Reid, you can quite easily identify the precise moment an interrogation begins. In an interview, the interviewer should

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74. *Id.* at 294.

75. *Id.*

76. *Id.* at 189, 303–27.

77. *Id.* at 6.

78. Kozinski, *supra* note 12, at 315–16; Eli Hager, *A Major Player in Law Enforcement Says it Will Stop Using a Method That’s Been Linked to False Confessions*, BUS. INSIDER (Mar. 9, 2017, 7:44 PM), <http://www.businessinsider.com/reid-technique-false-confessions-law-enforcement-2017-3> [https://perma.cc/GE5R-CS8J].

do very little talking but, in an interrogation, the interrogator should do most of the talking. That makes sense in Reid methodology because the interrogation is designed simply to confirm what the interrogator already assumes—that the suspect is guilty and the interrogation is merely an opportunity for the suspect to tell his side of the story.

After the multi-day training finished, I casually asked for the instructor's thoughts on why critics believe the Reid method produces false confessions. He explained that it's not the technique, but rather how investigators use it. He commented that investigators get themselves in trouble by cherry-picking from the interrogation steps or, worse, jumping into an interrogation without first conducting an interview.

I have since arrived at a handful of conclusions about the Reid technique. First, it works. It works in the sense that it does well at eliciting incriminating statements (I did not say truthful or accurate incriminating statements). Second, it is powerful and dangerous. Because it works, it should be viewed like a weapon that can fall into the wrong—i.e., poorly trained—investigator's hands. Third, it lacks oversight and continuing education.<sup>79</sup> All of the program's graduates are apparently qualified to interrogate suspects. Sure, officers may (I hope) undergo additional training,<sup>80</sup> but that's the point: there is no central oversight body to require additional training. In other words, there are no ABA site teams for interrogators and, moreover, Reid training is *not* legal training.

Fourth, it has a high risk of misuse. Because there is no required additional training—and because the law does not map well with Reid—the risk that interrogators will misuse it is much higher. Finally, its misuse can produce false confessions.

### III.

Reviewing interrogations with a fuller appreciation of the Reid method's nuances (particularly distinguishing between when an investigator engages in a Reid interview vs. a Reid interrogation), has dramatically altered how I conceptualize and teach *Miranda's* protections. Dassey's case forcefully

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79. See Hayley M. D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 L. & HUM. BEHAV. 270, 271 (2016).

80. The Reid website volunteers, "[s]ome organizations offer a generic certification after an individual has attended a seminar and passed a written examination." Based on attending a series of additional seminars alongside accruing certain on-the-job experiences, Reid & Associates will provide that the person is a "Certified Interviewer." *Frequently Asked Questions: What Does it Mean to be a Certified Interviewer?*, JOHN REID & ASSOCIATES, INC., <http://www.reid.com/faq/> [https://perma.cc/BP79-W3LA] (last visited Apr. 16, 2019).



illustrates why that classroom change is necessary. Or, more precisely, Dassey's case demonstrates why knowledge of the Reid technique matters in criminal practice.

The *Making a Murderer* Netflix documentary series focuses in episode three on Dassey's March 1, 2006, interrogation.<sup>81</sup> And appropriately so. As noted, that Reid interrogation was the subject of Dassey's petition for Supreme Court review.<sup>82</sup> But the documentary omits other critical Reid interrogations of Dassey that set the table for Dassey's March 1 "confession"—particularly law enforcement's obvious Reid interrogations of Dassey on November 6, 2005, and three interrogations on February 27, 2006. The documentary, in fact, neither explores—nor even mentions—these other Reid interrogations of Dassey. But Dassey's interactions with law enforcement during those interrogations were critical contributors to his March 1 "confession."

This Part considers each of the Dassey interrogations in turn alongside the major legal issues that arise from each. Those issues generally correspond with some of the major topics in the investigative criminal procedure course.

#### A. *The November 6, 2005 Interrogation*

As noted briefly earlier, Dassey was first questioned by law enforcement on November 6, 2005. Once Marinette County Detectives Anthony J. O'Neill and Todd Baldwin stopped a car with Bryan Dassey and Brendan Dassey inside, the detectives seized the vehicle and asked to speak with Bryan and Brendan separately.<sup>83</sup>

The officers began to question Dassey after separating him from his brother and placing him inside the detectives' squad car. Once there, O'Neill did not advise Brendan Dassey of his *Miranda* rights and instead informed Dassey that he was not under arrest.<sup>84</sup> Although detectives had seized the vehicle Dassey was driving and towed it away, O'Neill also told Dassey that he was free to leave at any time.<sup>85</sup> During the roadside questioning, Dassey relayed foundational details that would cement law enforcement's belief in his involvement in Halbach's murder.

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81. Steven Avery & Brendan Dassey Cases, *Brendan Dassey Police Interview/Interrogation Part #1 (Making a Murderer Steven Avery Case)*, YOUTUBE (Dec. 28, 2015), <https://www.youtube.com/watch?v=NYOaIDxirHE> [<https://perma.cc/LZ4H-UVHQ>].

82. Petition for Writ of Certiorari, *supra* note 13, at 17–30.

83. Transcript of Trial Day 4 at 105–07, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2007).

84. *Id.* at 106.

85. *Id.*

As far as Reid, though, the November 6 interrogation offers a perfect example of how knowledge of the technique allows for identifying the precise moment when the detectives shift from a Reid interview (which is assessment-focused) into use of the nine-step technique to interrogate Dassey (which presumes guilt). But the November 6 interrogation also offers a good example of another concern: jumping into an interrogation without completing the interview. Done properly, an investigator performs a Reid interview and, following the interview, performs an independent investigation to either corroborate or discredit a suspect's story.<sup>86</sup> Only after doing so should an interrogation commence.<sup>87</sup> But in Dassey's case—very early on—we see an investigator perform an interview and interrogation all in one session while cherry-picking steps from the nine-step interrogation technique. Let's get specific.

O'Neill and Baldwin took turns questioning Dassey in the squad car for approximately forty-five minutes. For the first roughly twenty minutes of the interaction, the detectives were formal with Dassey but non-confrontational.<sup>88</sup> During that portion, Dassey's story is simple. He says that he never saw Halbach on the afternoon of October 31—the day she came to visit Avery—when the school bus dropped him off at home.<sup>89</sup> But at roughly the twenty-minute mark of the questioning, the tenor changes dramatically and O'Neill shifts into an interrogation.<sup>90</sup> Following a long pause, which in my opinion signals the shift, the detectives have this critical exchange with Dassey:

BALDWIN: Yeah. You remember that girl taking that picture. You're gettin' off the bus, it's a beautiful day, it's daylight and everybody sees her, you do too. Do you remember seeing that girl standing there taking a picture?

DASSEY: Maybe, I don't know . . . don't remember.

BALDWIN: Brendan, come on.

O'NEILL: You do know, don't you[?] Brendan, you're not going to disappoint any of us. Think about that girl, was that girl standing there taking a picture that day?

DASSEY: Maybe.

O'NEILL: Ah, it's either a yes or no, I mean I'm not puttin' nothin' in your mind. You tell me if you remember that girl standing there taking pictures.

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86. INBAU ET AL., *supra* note 62, at 354–56.

87. *See id.* at 6, 169.

88. Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives, *supra* note 24, at 1–17.

89. *Id.* at 8.

90. *See id.* at 17.

DASSEY: [No reply.]

O'NEILL: Was she? Huh? Why won't you tell me?

DASSEY: I was just trying to think of if I seen her.

O'NEILL: Well did you see her standing there taking a picture?

DASSEY: Yeah.

O'NEILL: Why didn't you tell me that? You scared?

DASSEY: [No reply.]

O'NEILL: Huh?

DASSEY: Yeah.<sup>91</sup>

The remaining twenty minutes of the interrogation persist in similar confrontational fashion. Both O'Neill and Baldwin push Dassey to say, apart from admitting that he saw Halbach, that he saw Halbach's car and, moreover, that he knew a bonfire in Avery's yard was planned for the week of October 31.<sup>92</sup> Dassey also admitted speaking with Avery on October 31 and seeing him in his garage that evening.<sup>93</sup> The detectives entice those details from Dassey by quite remarkably reassuring him that he's not going to jail: "Okay, let's get beyond being scared, let's get beyond the idea of you getting in trouble and goin' to jail cuz that's not gonna happen, okay?"<sup>94</sup> The interview concluded after nearly fifty-four minutes,<sup>95</sup> and the detectives took Brendan home "without incident."<sup>96</sup>

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91. *Id.* at 17–18.

92. *Id.* at 10, 13, 29.

93. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 545–46.

94. Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives, *supra* note 24, at 36.

95. *Id.* at 48.

96. Marinette Cty. Sheriff's Dept. Interview of Brendan Dassey, *supra* note 30, at 1–2. In his written report following the November 6 interview, Detective O'Neill specifically noted the inconsistencies in Brendan's statement:

During the interview Brendan told us that he lives with his mother on Avery Road next to his uncle Steven Avery. He told us that he had never seen Teresa Halbach nor her Toyota SUV at their property on Avery Rd. When I asked Brendan specifically about seeing either Halbach or her vehicle on Monday October 31st 2005 he again told us that he had not seen either.

...

When I confronted Brendan about seeing Teresa Halbach when he had gotten off the bus with his brother on that Monday, Brendan now said that he had seen Teresa Halbach and her vehicle and that he did not tell us because he did not want to go to jail. When I asked Brendan as to what he had seen of Teresa, Brendan said that while he was walking down the driveway with his brother they had moved off to the side of the driveway to allow the Toyota SUV to go by.

The legal impact of that November 6 roadside questioning is relatively clear: Dassey was in custody for *Miranda* purposes beginning at the twenty-minute mark of the interview. Custody for *Miranda* purposes is an objective inquiry that exists when “a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’”<sup>97</sup> The initial determination of custody “depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.”<sup>98</sup> In the context of the interrogation, the question is whether a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave.<sup>99</sup> The suspect’s age, so long as it’s known to the officer at the time of police questioning, is a relevant factor in the custody analysis.<sup>100</sup>

Despite O’Neill telling Dassey at the outset that he was not under arrest and was free to leave at any time, those pro forma disclaimers, which many lower courts find persuasive,<sup>101</sup> are worthless at the moment when confrontational questioning began—or, in other words, when Reid interrogation began. Detectives used a handful of Reid steps to push Dassey into changing his story, most notably directly confronting Dassey (step 1), developing a theme by encouraging Dassey to “think about the girl” (step 2), minimizing his involvement by telling him he will not go to jail (step 2), and overcoming Dassey’s denials (step 3)—among other Reid tactics.

Reid aside, the car Dassey was driving had been seized and towed away. Dassey was therefore dependent on law enforcement for transportation. When considered alongside Dassey’s educational background and the fact that Dassey was questioned in relay fashion by two officers in the backseat of a squad car with closed doors, it is clear that no reasonable person in Dassey’s shoes would feel free to terminate the encounter and leave.

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Brendan told us that the vehicle had been traveling out of the driveway toward the road and that it had only been on the property for five minutes.

When asked again as to if he had seen Teresa out of the vehicle by the van by his and his uncles home Brendan now told us that while he was in his home after walking down the driveway to his home, from the kitchen by the kitchen sink window Brendan had seen his uncle Steven Avery and the girl taking pictures by the van parked in front of his home.

97. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

98. *Stansbury v. California*, 511 U.S. 318, 323 (1994).

99. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

100. *J. D. B. v. North Carolina*, 564 U.S. 261, 277 (2011).

101. Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives, *supra* note 24, at 1.

Equally clear, the detectives' direct and accusatory questioning constituted *Miranda* interrogation.<sup>102</sup> Dassey, then, should have received *Miranda* warnings at roughly the twenty-minute mark of the "interview." Absent those warnings, the Reid-savvy defense attorney should win a suppression motion to suppress the statements Dassey made in the squad car (assuming the state wanted to introduce them against Dassey). But ignorance of Reid might cause a defense attorney to reach a different result. After all, under many prevailing attorney perspectives, *Miranda* never attached because of Detective O'Neill's boilerplate qualifiers that Dassey was not under arrest and was "free to leave." Also problematic, the Reid technique separates an interview from an interrogation, but Supreme Court *Miranda* jurisprudence provides just one standard for both "custody" and "interrogation."<sup>103</sup> Use of a singular custody standard means that a suspect might be in custody—or not—during either a Reid interview or interrogation.

Admittedly, the state never sought to use Dassey's November 6 statements as direct evidence of Dassey's guilt at trial because, by then, it had Dassey's detail-laden March 1, 2006, confession to work with. But during the trial's fourth day, the state introduced audio from the November 6 interview in order to ask Detective O'Neill about his impressions of Dassey's demeanor.<sup>104</sup> During his testimony, O'Neill said that Dassey had "an inner struggle" and that, in his opinion, Dassey "was hiding something."<sup>105</sup> Because those comments were designed to provide the jury more context for why investigators conducted subsequent interrogations of Dassey, the November 6 interrogation stands more as a cautionary tale for use in the classroom. Prospective prosecutors and defense attorneys alike can clearly see how knowledge of the Reid technique informs *Miranda*'s attachment and, more precisely, *when* it should attach.

#### B. *The February 27, 2006 Schoolhouse Interrogation*

After the November 6, 2005, roadside interrogation, police interviewed Brendan again four days later. The transcript from this interview is discussed in Dassey's appellate brief:

During a second interview on November 10, [2005], Brendan told police that he had attended a bonfire in Steven's yard around November 1. He stated that he and Steven had burned branches, wood, a few old tires, and a junked car seat—but he

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102. *Id.* at 18.

103. *Miranda v. Arizona*, 384 U.S. 436, 447–49 (1966).

104. Transcript of Trial Day 4, *supra* note 83, at 123, 125–26.

105. *Id.* at 124.

had seen no sign of Halbach while he was there. Brendan had been at the fire for only an hour or two and had left when it was still burning steadily.<sup>106</sup>

Investigators left Dassey alone for several months after questioning him in November. But in January of 2006, Kayla Avery, Dassey's fifteen-year-old cousin, walked into Susan Brandt's office at Mishicot High School.<sup>107</sup> At the time, Brandt was interning at both the high school and Mishicot Middle School as part of completing her Master's Degree in Counselor Education.<sup>108</sup> According to Brandt, Kayla entered her office and said she "was scared" because "her uncle, Steven Avery, had asked one of her cousins to help move a body."<sup>109</sup> The cousin to whom she was referring was, of course, Dassey.<sup>110</sup>

That next month, specifically on February 20, 2006, Calumet County Investigators Mark Wiegert and Wendy Baldwin interviewed Kayla.<sup>111</sup> During that interview, Kayla told investigators that Dassey was "acting up lately" and, in particular, that Dassey "would just stare into space and start crying, basically, uncontrollably."<sup>112</sup> She also relayed to investigators that, in her opinion, Dassey had recently lost approximately forty pounds.<sup>113</sup>

Based on Kayla's February 20 interview, Wiegert decided to question Dassey again.<sup>114</sup> On Monday, February 27, 2006, Detective Wiegert and Tom Fassbender, a special agent with the Department of Justice Division of Criminal Investigation's Special Assignments Bureau, pulled Dassey out of class at Mishicot High School to question him.<sup>115</sup> The interrogation, which took place in a conference room at the school without a lawyer or guardian present, began at 12:30 p.m. and concluded at 2:14 p.m.<sup>116</sup>

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106. Brief of Defendant–Appellant, *supra* note 3, at 7. Investigators presumably remained interested in Dassey given that Halbach's bone fragments were found in a burn pit on the Avery property. Tufayel Ahmed, 'Making a Murderer' New Evidence: Teresa Halbach Was Alive After Meeting Steven Avery, Bobby Dassey Looked at Pictures of Mutilated Dead Women, Lawyers Say, NEWSWEEK (Oct. 24, 2017, 7:41 AM), <https://www.newsweek.com/making-murderer-new-evidence-teresa-halbach-steven-avery-bobby-dassey-691428> [<https://perma.cc/F9MY-36FY>].

107. Transcript of Trial Day 3 at 168, State v. Dassey, No. 06 CF 88 (Manitowoc Cty. Ct. 2007).

108. *Id.* at 166–67.

109. *Id.* at 169.

110. Transcript of Trial Day 4, *supra* note 83, at 190.

111. *Id.* at 189.

112. *Id.* at 190.

113. *Id.*

114. *Id.*

115. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 440.

116. *Id.* at 440, 482.

The *Making a Murderer* Netflix documentary series did not feature or mention the schoolhouse interrogation, but the interrogation offers another example of how an attorney's knowledge of the Reid interrogation technique can better inform *Miranda*-related arguments. Whereas the November 6 interrogation offered considerable insight into when a Reid interview shifts into a Reid interrogation, Wiegert and Fassbender on February 27 bypassed the interview steps and immediately began using Reid interrogation techniques. But only a knowledge of Reid would help the savvy defense attorney spot that what took place in that school conference room was hardly a "witness interview" as Wiegert would assert later.

At the outset of the interrogation, Wiegert and Fassbender told Dassey that he was not under arrest, was free to leave, and did not have to answer their questions.<sup>117</sup> Almost immediately thereafter, in the first two minutes, the detectives began relying on step two of the Reid technique (theme development)—justice for Teresa.<sup>118</sup> The detectives were, moreover, confrontational with Dassey within those first two minutes. Relying on Reid step one (direct confrontation), Fassbender asserts, "And I'm looking at you Brendan and I know you saw something and that's what's killing you more than anything else, knowing that Steven did this, it hurts."<sup>119</sup>

Further evidence of the Reid interrogation technique persists throughout the interrogation, including step six of Reid (dealing with a suspect's passive mood). Throughout the first portion of the interrogation, both detectives question Dassey extensively on whether he saw body parts in the bonfire he attended.<sup>120</sup> Dassey first responds that he only saw a "garbage bag" but detectives push.<sup>121</sup> As the interrogation continues, they encourage him to "be honest" and assure Dassey that they will "go to bat" for him.<sup>122</sup> Wiegert further assures Dassey, "We're not gonna run back and tell your grandma and grandpa what you told us or anything like that."<sup>123</sup> For more than twenty minutes, Dassey is largely nonresponsive to Wiegert and Fassbender's persistent efforts.<sup>124</sup> But the detectives break through a little more than halfway through the interrogation:

WIEGERT: It's not your fault. Remember that.

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117. *Id.* at 440, 467.

118. *Id.* at 440, 443.

119. *Id.* at 442.

120. *Id.* at 442–45.

121. *Id.* at 442–43, 445, 454.

122. *Id.* at 448.

123. *Id.*

124. *Id.* at 450–51.

FASSBENDER: Yeah, it's not your fault . . . Like I said, Mark and I are not going to leave you high and dry. I got a very, very important appointment at 3:00 today. Well I ain't leavin' for the appointment until I'm sure you're taken care of . . . telling the truth . . . get this off your chest and get it out in the open . . . so go ahead and talk to us about what you saw in the fire are killin' you right now . . . what you see. Go ahead, go ahead . . . you've got to do this for yourself. I know you feel that it's gonna hurt Steven, but it's actually, actually gonna help Steven come to grips with what he needs to do . . . You know we found some flesh in that fire too. We know you saw some flesh. We found it after all that burned. I know you saw it . . . Tell us. You don't have to worry about . . . you won't have to prove that in court. (phone rings) Tell us what you saw. You saw some body parts . . . You're shaking your head . . . tell us what you saw . . .

BRENDAN: . . .

FASSBENDER: You all right? You all right? What other parts did you see?

BRENDAN: Toes.<sup>125</sup>

The remainder of the interrogation included additional statements from Dassey that minimally, to the minds of investigators, put him at or near the crime scene as or after it happened. For example, Wiegert and Fassbender would get Dassey to admit that he saw some clothes "like a blue shirt, some pants."<sup>126</sup> They also get him to admit, after suggesting it to him, that there was blood on those clothes.<sup>127</sup> For the first time, following two prior interactions with investigators, Dassey placed himself at or near the scene of Halbach's death.

Fassbender and Wiegert permitted Dassey to return to class at 2:14 p.m. when that interrogation ended.<sup>128</sup> But at 3 p.m., Dassey returned to the school conference room.<sup>129</sup> Wiegert and Fassbender would then take Dassey to the police station for another interrogation.<sup>130</sup>

There is much to be concerned about with this first February 27 interrogation. Chief among those concerns is the investigators' use of adult interrogation tactics on a juvenile with significant intellectual and social

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125. *Id.* at 451.

126. *Id.* at 448.

127. *Id.* at 449.

128. *Id.* at 482.

129. *Id.*

130. *Id.*



limitations.<sup>131</sup> Add to that the absence of a guardian during the interrogation. Even the Reid technique counsels that, in the case of juveniles, it's best to involve the parents:

Several states provide by statute that a youthful offender (juvenile) suspect cannot be interrogated unless one parent or guardian is present. Under this requirement, the investigator should spend some time with the parent before questioning a son or daughter. During this session, the investigator should take a positive approach and impress upon the parent that the only interest in talking to the youth is to ascertain the truth. The investigator should emphasize that he is just as much interested in establishing innocence as responsibility.<sup>132</sup>

Still other concerns merit highlighting. It might seem, by any measure, that Dassey was in custody for purposes of *Miranda*. But recall that the interrogation began with Fassbender telling Dassey he was “free to leave,” not under arrest, and that he did not have to answer questions. Lower courts often weigh those comments heavily in finding the particular interaction non-custodial for *Miranda* purposes—no matter what happens afterward.<sup>133</sup> Although the question of whether Dassey was in custody during this schoolhouse interrogation was never litigated, a non-custody result would likely occur here unless the defense attorney educated the suppression court about the use of Reid. Remember, Reid is designed to psychologically pressure the suspect and, accordingly, no reasonable person would feel free to leave during a Reid interrogation.

Apart from *Miranda* custody concerns, why does this first February 27 interrogation matter? Dassey for the first time placed himself at the crime scene. His involvement level, to the minds of investigators, was therefore subject to further investigation. Relatedly, Fassbender and Wiegert learned that Dassey could be pressured into providing incriminating responses. Whether they pressured him in good or bad faith in that school conference room (and in later interrogations) is irrelevant. The point is that they learned Dassey could succumb—easily—to the Reid method. Stated more simply, Wiegert and Fassbender realized in that first February 27 interrogation that the Reid method worked on Dassey. That type of police discretion to use Reid on an unsophisticated juvenile suspect—if left unchecked by a defense attorney—is at once powerful and scary.

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131. Petition for Writ of Certiorari, *supra* note 13, at 23–24.

132. INBAU ET AL., *supra* note 62, at 252.

133. See, e.g., *J. D. B. v. North Carolina*, 564 U.S. 261, 264–65 (2011); *Ross v. State*, 45 So. 3d 403, 407 (Fla. 2010), *cert. denied*, 562 U.S. 1169 (2011); *United States v. Newton*, 369 F.3d 659, 662 (2d Cir. 2004); *United States v. Carter*, 884 F.2d 368, 369 (8th Cir. 1989).

In sum, the first February 27 interrogation demonstrates that knowledge of Reid could have clarified when Dassey was in custody for purposes of *Miranda* while countering investigator claims that what took place in that conference room constituted merely a “witness interview.”

*C. The February 27, 2006 Stationhouse Interrogation*

When the schoolhouse interrogation concluded, Wiegert and Fassbender permitted Dassey to return to his classes. He specifically rejoined his Earth Science class, which he described to investigators as “about rock.”<sup>134</sup> Dassey returned to the school conference room at 3 p.m. where Wiegert and Fassbender were waiting.<sup>135</sup> They asked him and his mother, Barbara, who had arrived shortly after he returned to class, to accompany them to a nearby police station to participate in a videotaped interrogation.<sup>136</sup>

That second February 27 stationhouse interrogation, which also went unexplored by the Netflix documentary, raises another set of unpreserved issues, largely focused on *Miranda* custody and waiver, for use in the law school classroom.<sup>137</sup> Of course, had Dassey’s then lawyer had a firm understanding of the Reid interrogation technique, then perhaps he would have had a fuller range of preserved *Miranda*-related arguments to present in his Supreme Court petition.<sup>138</sup> In any event, Fassbender and Wiegert took Brendan to the Two Rivers Police Station, which is roughly 7.7 miles from the high school.<sup>139</sup> The interrogation began at 3:21 p.m. and lasted roughly forty-three minutes without a lawyer or guardian present.<sup>140</sup> Although the officers later asserted that they asked Dassey’s mother whether she wanted to join him in the interrogation room, Barbara said they made no such offer.<sup>141</sup>

Once there, Dassey for the first time received *Miranda* warnings, which he “waived” and began repeating to detectives his story that Avery tied up and stabbed Halbach.<sup>142</sup> He again told Wiegert and Fassbender that he saw “girl

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134. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 481.

135. *Id.* at 482.

136. *Id.* at 482–83.

137. Brief of Defendant–Appellant, *supra* note 3, at 38.

138. *Cf.* Petition for Writ of Certiorari, *supra* note 13, at 17 (arguing only that Dassey’s confession was involuntary pursuant to the due process clause).

139. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 482–83.

140. *Id.* at 483; Transcript of Trial Day 5, *supra* note 3, at 7–8.

141. Transcript of Trial Day 5, *supra* note 3, at 7; Transcript of Motion Hearing, *supra* note 2, at 69.

142. Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *supra* note 3, at 484, 492.

clothes” and there was some blood on them.<sup>143</sup> He also again repeated that he saw body parts in the bonfire on the night of October 31.<sup>144</sup>

But his story included new details unmentioned during the earlier schoolhouse interrogation. In particular, he said that Avery stabbed Halbach in her stomach in what Dassey called her “jeep.”<sup>145</sup> He added that Avery hid the knife under the seat and then tried to hide the jeep.<sup>146</sup> He further relayed that Avery transported Halbach’s body to the bonfire fire pit using a snowmobile sled.<sup>147</sup>

The new details of Dassey’s story also included more of his personal involvement. When asked by Wiegert whether he helped Avery put anything in Avery’s garage after Halbach was killed, he admitted, “Yeah, ah, we took the silver cool ah, gray jeep and put it in the garage.”<sup>148</sup> The interrogation ended at roughly 4:30 p.m.<sup>149</sup>

Dassey, an intellectually challenged sixteen-year-old, was in custody at the Two Rivers Police Department. That is, a reasonable person in Dassey’s position would not have felt as though he or she could terminate the stationhouse interrogation and leave. To begin with, he entered an interrogation room setup according to the Reid technique. He was seated in a straight-backed chair on the end furthest from the exit of a sparsely appointed room with the detectives seated between him and the single door.<sup>150</sup> The room had nothing hung on the walls, was painted in a neutral color and included an observation mirror.<sup>151</sup> Although the interrogation was recorded, both detectives entered with a file and a notepad for the ostensible purpose of taking notes.

The decision to question Dassey in a precise and controlled setting was no accident. Before commencing a Reid interrogation, the Reid method counsels investigators to set up a private soundproof room within the police station that is free from distractions and furnished sparsely with straight-backed chairs.<sup>152</sup> The room should also be equipped with a one-way observation mirror so that other detectives can evaluate the suspect’s “behavior symptoms.”<sup>153</sup> Arranging

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143. *Id.* at 493–94.

144. *Id.* at 488–90.

145. *Id.* at 492.

146. *Id.*

147. *Id.*

148. *Id.* at 501.

149. Transcript of Trial Day 5, *supra* note 3, at 7–8.

150. Interrogation Photo 1, *infra* p. 803.

151. Interrogation Photo 1, *infra* p. 803.

152. INBAU ET AL., *supra* note 62, at 46–47.

153. *Id.* at 47–48.

the room in this manner, according to Reid, isolates the suspect and removes the suspect from any familiar surroundings, thereby heightening the suspect's anxiety while incentivizing the suspect to extricate himself from the situation.<sup>154</sup> As the picture from his interrogation reflects, Wiegert and Fassbender followed Reid's guidance to a tee.

Interrogation Photo 1



Once the stationhouse interrogation began, Wiegert and Fassbender pick up where the schoolhouse interrogation left off by relying on a previously unused step of the Reid interrogation technique. Unlike the schoolhouse interrogation, where Wiegert and Fassbender were confrontational (step 1), sought to develop an interrogation theme (step 2) and handled Dassey's denials (step 3), this interrogation largely relied on step 8—having the suspect orally relate various details of the offense. Throughout the conversation, Wiegert and Fassbender frequently return to his story in order to test whether or not he will tell the same story. During one sequence of fifteen pages of interview transcript, they push him to confirm his story three different times.<sup>155</sup>

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154. *Id.* at 46–47.

155. Wiegert and Fassbender push Dassey to confirm details about the fire, how Teresa died, what Teresa's car looked like, and his own involvement multiple times. Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *supra* note 3, at 487–501. For example, they asked, “When you say you saw her belly, how do you know it was her belly?” *Id.* at 489. Shortly thereafter, they asked Dassey, “So just so I’m clear on this. Where did he say that he stabbed her?” *Id.* at 496. By way of final illustrative example, Wiegert and Fassbender asked, “You told me before that he, he told you that he stabbed her in the stomach.” *Id.* at 498.

But despite overwhelming evidence that Dassey was in custody at the stationhouse on February 27, Wiegert would testify during a hearing on his motion to suppress that what took place was merely a “witness interview.”<sup>156</sup> The prosecutor, Ken Kratz, had this exchange with Wiegert:

Q: Describe for the Court the difference between a witness interview and a suspect interview if, in fact, there are any differences?

A: Well, there’s several differences. A witness interview, basically, is when a person is not in custody. They’re free to leave. They can stop answering questions at any time. Um, they’re treated as somebody who may have information about a case. Or a suspect interview, sometimes they’re not free to go. Um, they’re sometimes, um, you know more information, you know that they’re involved in something, they’re treated as that you already know something has occurred and they are involved in it. That’s the difference between the two.<sup>157</sup>

Calling what took place a “witness interview” is good practice—for an investigator. Left unchecked by the defense attorney untrained in Reid permits an officer (and therefore the prosecutor) to argue that *every* police–suspect conversation was merely a noncustodial interview. That’s what happened here. Len Kachinsky, a lawyer who represented Dassey for a time prior to trial, conceded that what took place on February 27—even at the stationhouse—was not *custodial* interrogation.<sup>158</sup> Although he received *Miranda* warnings prior to the February 27 stationhouse interrogation, that did little to alter the perception of the interrogation’s environment in the eyes of his lawyer. Indeed, Kachinsky appeared to miss the custody issue because of his uniformed acceptance of Wiegert’s statement. But even a casual understanding of Reid would have caused a reasonable defense attorney in similar circumstances to reject Wiegert’s characterization of the February 27 stationhouse interrogation as a “witness interview.”

One other troubling legal issue arose during the February 27 stationhouse interrogation—whether Dassey actually waived his *Miranda* rights. Neither the Supreme Court nor the Reid technique expressly considers the role of age or education in the *Miranda* waiver calculus.

A waiver of *Miranda* rights, pursuant to *Edwards v. Arizona* “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each

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156. Transcript of Motion Hearing, *supra* note 2, at 14–15.

157. *Id.* at 14.

158. *Id.* at 6–7.

case ‘upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’”<sup>159</sup>

For its part, the Reid technique advises that “the interrogation of juvenile suspects may be conducted in essentially the same way as for adults.”<sup>160</sup> That interrogation process, per Reid, includes taking no special precautions when obtaining a *Miranda* waiver. It is hard to blame the Reid method, though, given that the Supreme Court has not considered a juvenile interrogation case in nearly forty years.<sup>161</sup> And *Fare v. Michael C.*, in the context of waiver, expressly held back in 1979 that no reason existed to create a separate juvenile *Miranda* waiver standard—separate, that is, from the adult standard.<sup>162</sup> Perhaps the Supreme Court would be more active in *Miranda* waiver jurisprudence if it knew that Reid, the most prominent interrogation method in the country, draws no distinction between adults and juveniles.

In any event, *Edwards* is clear that a valid waiver “cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights.”<sup>163</sup> But that’s precisely what happened in Dassey’s case. At the outset of the February 27 stationhouse interrogation, Wiegert read to Dassey his *Miranda* rights.<sup>164</sup> After doing so, Wiegert added:

WIEGERT: \*\*\* No promises or threats have been made to me and no pressure of any kind has been used against me. Do you agree with that?

DASSEY: Yeah.

WIEGERT: You have to speak up a little bit.

DASSEY: Yeah.

WIEGERT: Yes?

DASSEY: Yes.

WIEGERT: Then if you agree with making a statement, I need you to sign right there and if you wanna read it, you can read it there, (pause) Why don’t you put your initials here and put your initials here. These are the two things I read to you. (pause) OK, and I’m just going to put the place up here, Two Rivers Police Department, and the date is 2/27/06, and the time is approximately 3:21 p.m. OK. Let’s put that over there for now. Um, Brendan, just a few things. OK, we’re going to talk

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159. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

160. INBAU ET AL., *supra* note 62, at 419.

161. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

162. *Id.*

163. *Edwards*, 451 U.S. at 484.

164. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 483.

about what you had initially told us earlier, OK. Um, can you state your full name with middle initial and date of birth?

DASSEY: Brendan Ray Dassey and then 10/19/ of 89.<sup>165</sup>

Notice that Dassey answered only the question of whether Wiegert had made any promises or threats to him. Dassey, however, at no point indicated that he understood his rights either individually or together. That by itself is concerning, but particularly so for a suspect who, again was sixteen, suffered from speech and language impairment, received special education services, and scored in the low average to borderline disabled category on IQ tests.

Dassey did not knowingly or voluntarily waive his *Miranda* rights and suggesting the contrary is a legal fiction. The Court *should* revisit the question of whether an intellectually and socially challenged juvenile can properly waive *Miranda* pursuant to an adult waiver standard. But its opportunity to do so is hardly a foregone conclusion; Dassey's trial lawyer, after all, either waived or missed the issue. In the interim, it falls on the defense bar to educate suppression courts that Reid's failure to alter its nine-step technique for juvenile offenders reaches questions about the attachment of *Miranda* custody and the legitimacy of *Miranda* waiver.

#### D. The March 1, 2006 Stationhouse Interrogation

Of course, all of this—the two interrogations on February 27 and the one to come that night—builds to March 1, 2006, which again was at the center of Dassey's Supreme Court petition.<sup>166</sup> Thanks to episode three of *Making a Murderer*, which focused on the March 1 interrogation,<sup>167</sup> the fame of Dassey's confession grew far outside legal circles.<sup>168</sup> Because of its notoriety, the March 1 interrogation makes for a compelling teaching tool, particularly in four main

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165. Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *supra* note 3, at 484.

166. See generally Petition for Writ of Certiorari, *supra* note 13.

167. Jethro Nededog, *Everything You Need to Know About 'Making a Murderer' if You Don't Want to Spend 10 Hours Watching*, BUS. INSIDER (Aug. 12, 2016, 6:32 PM), <http://www.businessinsider.com/netflix-making-a-murderer-recap-2016-8#-3> [<https://perma.cc/P4E2-BEWP>].

168. See, e.g., Ashley Louszko et al., *'Making a Murderer': The Complicated Argument Over Brendan Dassey's Confession*, ABCNEWS (Mar. 8, 2016, 5:51 PM), <https://abcnews.go.com/US/making-murderer-complicated-argument-brendan-dasseys-confession/story?id=37353929> [<https://perma.cc/2KZD-P7G7>]; Jesse Singal, *The Science Behind Brendan Dassey's Agonizing Confession in Making a Murderer*, THE CUT (Jan. 11, 2016), <https://www.thecut.com/2016/01/science-behind-brendan-dasseys-confession.html> [<https://perma.cc/GW92-46SV>]; Megan Willett, *The Most Controversial Confession in 'Making a Murderer' Was Crazier than the Doc Reveals*, BUS. INSIDER (Jan. 7, 2016, 2:03 PM), <http://www.businessinsider.com/making-a-murderer-brendan-dassey-confession-2016-1> [<https://perma.cc/V89B-Y4AW>].

areas outside the voluntariness doctrine: *Miranda* custody, *Miranda* waiver, interrogation techniques, and the legal import sequential interrogations.

But something strange happened before the March 1 confession. When the stationhouse interrogation ended on February 27, 2006, at roughly 4:30 p.m., investigators made an interesting decision not to let him or his mother, Barbara, return home.<sup>169</sup> Instead, Wiegert and Fassbender arranged for them to spend the night at the state's expense under police guard at a hotel near the Two Rivers Police Station.<sup>170</sup> Investigators, they said later, were concerned (1) about Dassey and Barbara's safety, and (2) that the two might tamper with evidence if they went back home.<sup>171</sup> Why those concerns dissipated on the night of February 28 is not clear. Dassey even went to school the following day.<sup>172</sup>

In any event, Wiegert and Fassbender paid a visit to Dassey at the hotel that night.<sup>173</sup> They would interrogate him during an unrecorded session of an unknown length. And something important happened that night: Dassey told Fassbender that he stained his pants with bleach as he helped clean Avery's garage floor.<sup>174</sup> Wiegert testified later that after those interrogations, he thought that Dassey might have been involved in disposing of Halbach's body.<sup>175</sup> The Reid method would counsel him to independently corroborate Dassey's story. But that's not what happened next.

After a night at the hotel, Dassey and Barbara were released on February 28.<sup>176</sup> On the following day—March 1, 2006—Wiegert and Fassbender removed Dassey from his high school at 9:50 a.m.<sup>177</sup> By 10:05 a.m., the trio left the high school to begin the 11.6 mile drive to the Manitowoc Sheriff's Department.<sup>178</sup> In-car audio captures the initial questioning, during which Dassey waives his *Miranda* rights.<sup>179</sup> He also gives the investigators

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169. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 483.

170. *Id.*

171. Transcript of Trial Day 5, *supra* note 3, at 9–10.

172. Transcript of Trial Day 7, *supra* note 21, at 45–46.

173. Transcript of Trial Day 5, *supra* note 3, at 10–11.

174. *Id.* at 11.

175. *Id.* Wiegert testified during direct examination at Dassey's trial, "Well, obviously, when you keep learning little bits and pieces, Brendan keeps telling us a little more here, a little more there, we realized it could probably be either saw more, knew more, something." *Id.*

176. Motion to Suppress at 5, State v. Dassey, No. 06 CF 88 (Manitowoc Cty. Ct. 2006).

177. *Id.*

178. *Id.*

179. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 526.



permission to pick up the bleach-stained jeans that he referenced during the hotel interrogation.<sup>180</sup>

Wiegert, Fassbender, and Dassey finally arrive at the police station at 10:43 a.m.<sup>181</sup> In classic Reid fashion,<sup>182</sup> Wiegert and Fassbender let Dassey sit alone in the interrogation room for precisely five minutes.<sup>183</sup> The videotaped interrogation begins at 10:56 a.m.<sup>184</sup> Fassbender and Wiegert then proceed to interrogate Dassey for more than four hours without an attorney or parent/guardian present. He confesses to raping Halbach and slitting her throat on his uncle's instruction.<sup>185</sup>

Statements from this March 1 interrogation become the evidentiary showpiece for the state at Dassey's trial. Investigators would never find physical evidence linking Dassey to Halbach's murder.<sup>186</sup>

### 1. Custody

Contrary to Dassey's early trial counsel's concession that the March 1 interrogation was non-custodial, Dassey was not free to leave at any time after investigators picked up from his high school—nor do they suggest otherwise to him. Indeed, unlike prior interrogations where Wiegert and Fassbender tell Dassey he is “not under arrest” and “free to leave,” they offer no similar reassurances on March 1. To the contrary, they take him from his school and transport him to a police interrogation room. Rather than ask if Dassey will accompany them, Wiegert tells Dassey immediately after picking him up that he is going to answer questions.<sup>187</sup> In doing so, he more than suggests to Dassey that his freedom is predicated on his willingness to answer the investigators' questions:

They've gotta nice quiet room there, there's no kids running in

180. *Id.* at 527–28.

181. Motion to Suppress, *supra* note 176, at 5.

182. INBAU ET AL., *supra* note 62, at 419 (“Prior to embarking upon the actual interrogation, it is advisable to allow the suspect to sit in the interview room alone for about five minutes.”).

183. Wiegert and Fassbender enter the interrogation room at *precisely* the five-minute mark. Steven Avery & Brendan Dassey Cases, *supra* note 81.

184. *Id.* The interrogation footage is time-stamped.

185. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 570–74 (providing Dassey's story about raping Halbach); *id.* at 586 (relaying Dassey confessing to cutting Halbach's throat while she was still alive).

186. *Dassey v. Dittmann*, 860 F.3d 933, 938 (7th Cir. 2017) (noting that “the State had failed to find any physical evidence linking [Dassey] to the crime”), *overruled on other grounds*, 877 F.3d 297 (7th Cir. 2017) (en banc).

187. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 527 (“All right, ah, so like I told you, we're going to take a ride over to the a Manitowoc Sheriff's Department”).

and out and stuff, so, and *if you play it right, who knows, maybe we'll get you back as soon as we can.* If we, we all get over there as soon as we can.<sup>188</sup>

What makes the custody conclusion so straightforward, aside from the extended detention of a juvenile with significant intellectual and social limitations, is investigators' thematic use, once again, of the Reid technique. We turn next to that use.

## 2. The Reid method persists

The investigators' rampant *misuse* of the Reid method sets the March 1 interrogation apart from its predecessors. As mentioned, rather than follow Reid's guidance to independently verify a suspect's story,<sup>189</sup> Wiegert and Fassbender in the limited interim time between the night of February 27 and the morning of March 1 do not obtain independent physical evidence to corroborate Dassey's involvement in Halbach's murder.

Instead, throughout the March 1 interrogation, they rely on Reid step 1 (confrontation) by asserting superior knowledge over Dassey, telling him at multiple points that they already know what happened.<sup>190</sup> Borrowing from step 2 (theme development), they also minimize Dassey's involvement and reassure him that they'll "stand behind" him.<sup>191</sup> At one point, Fassbender goes so far as to say, "Um, from what I'm seeing, even if I filled those [gaps] in, I'm thinkin' you're all right. OK, you don't have to worry about things."<sup>192</sup> Wiegert also selectively relies on step 5 (retaining the suspect's attention) by moving closer to Dassey, putting a hand on his knee and telling Dassey to be honest.<sup>193</sup> The honest person, Wiegert assures him, is the one who gets the better deal.<sup>194</sup> Moreover, Weigert adds, it's okay if Dassey helped his uncle, Steven Avery, kill Halbach as long as Avery was the one telling him to do it.<sup>195</sup> Minimization

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188. *Id.* (emphasis added).

189. INBAU ET AL., *supra* note 62, at 35 ("An investigation should be conducted in an objective manner and follow close guidelines with respect to proper interview and interrogation techniques, including reasonable efforts to corroborate confessions.").

190. *E.g.*, Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 543 ("And you stopped now remember this is very important cuz we already know what happened that day, OK."); *id.* at 547 ("We already know what happened."); *id.* ("We already know what happened now tell us exactly.").

191. *Id.* at 541.

192. *Id.* at 540.

193. This occurs at approximately the 37:15 mark. Steven Avery & Brendan Dassey Cases, *supra* note 81.

194. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 541.

195. *Id.* at 552.

techniques like these impermissibly communicated to Dassey that he would receive more favorable treatment from the criminal justice system if he provided the factual account desired by investigators.<sup>196</sup>

Aggressive use of powerful interrogation tactics also undermines the reliability and credibility of a suspect's confession.<sup>197</sup> Dassey's story, given its evolution, is hard to credit. Consider: in two prior interrogations on February 27, he admits that he was present at the scene and that Avery stabbed Halbach.<sup>198</sup> He repeats that story at the outset of the March 1 interrogation and again says "she was stabbed."<sup>199</sup> Somehow this morphs as the interrogation proceeds into Dassey saying that Avery cut off her hair,<sup>200</sup> punched her,<sup>201</sup> cut her,<sup>202</sup> and shot her.<sup>203</sup> His initial statement that Avery shot Halbach has garnered nationwide attention given that Wiegert is the one who first suggested to Dassey that a shooting occurred:

WIEGERT: So Steve stabs her first and then you cut her neck?

(Brendan nods "yes") What else happens to her in her head?

FASSBENDER: It's extremely, extremely important you tell us this, for us to believe you.

WIEGERT: Come on Brendan, what else?

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196. Minimization is generally considered an interrogation technique whereby the interrogator "minimizes the severity of the offense and ostensibly empathizes with the interrogee, characterizing the act as accidental, spontaneous, or otherwise justifiable by external factors." Boaz Sangero & Mordechai Halpert, *Proposal to Reverse the View of a Confession: From Key Evidence Requiring Corroboration to Corroboration for Key Evidence*, 44 U. MICH. J.L. REFORM 511, 521 (2011). Psychologists have found through experimentation that use of minimizing techniques heightens the risk of a suspect confessing falsely. Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 (2005) ("As predicted, both the minimization tactics and the offer of a deal led to increases in the rates of true and false confessions.").

197. See generally Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525 (2009); Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21 (2014); Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHI.-KENT L. REV. 179 (2010).

198. Transcript of Brendan Dassey Mishicot High School Interview, *supra* note 3, at 444, 452–54, 458–59, 464–65; Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *supra* note 3, at 487–88, 492, 496, 503–04.

199. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 559.

200. *Id.* at 584.

201. *Id.* at 585.

202. *Id.* at 586.

203. *Id.* at 587–88.

(pause)

FASSBENDER: We know, we just need you to tell us.

BRENDAN: That's all I can remember.

WIEGERT: All right, I'm just gonna come out and ask you.  
Who shot her in the head?

BRENDAN: He did.

FASSBENDER: Then why didn't you tell us that?

BRENDAN: Cuz I couldn't think of it.<sup>204</sup>

Collectively, tactics like this are reminiscent of language from Chief Justice Warren's majority opinion in *Miranda*: "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."<sup>205</sup> But it also reminds law schools more broadly that students of Reid would be able to identify both the tactics and when those tactics are used to improperly pressure defendants—even if inadvertently.

### 3. Waiver

There are also *Miranda* waiver problems preceding Dassey's incriminating statements on March 1. Immediately after picking Dassey up from his high school, Wiegert read Dassey his *Miranda* rights:

Brendan, I'm just gonna to read you this form, it's your *Miranda* Rights and then we'll talk about that a little bit, OK?

The law requires you be advised you of the following rights:

- You have the right to remain silent
- Anything you say can and will be used against you in court
- You have the right to consult a lawyer and have him present with you while you're being questioned. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning.
- You have the right to stop answering questions at any time.<sup>206</sup>

The iteration of those *Miranda* warnings materially differs from the version Dassey received just days earlier on February 27. At the outset of the stationhouse interrogation just days earlier, Wiegert provided the following as Dassey's *Miranda* warnings:

Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say

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204. *Id.* at 587.

205. *Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

206. Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dept. Interview, *supra* note 3, at 526.

can be used against you in court. You have the right to, you have the right to talk, to a lawyer for advice before we ask you any questions and have him with you during questioning. You have this right to the advice and presence of a lawyer even though you cannot afford to hire one. We have no way of getting you a lawyer but one will be appointed for you if you wish and if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions any time. You also have the right to stop answering questions at any time until you talk to a lawyer.<sup>207</sup>

Although the *Miranda* Court itself made clear that no precise incantation is required,<sup>208</sup> the differences between these two sets of warnings matter and they present wonderful learning opportunities for students.<sup>209</sup> To begin with, although the prosecution never introduced the February 27 stationhouse interrogation into evidence against Dassey,<sup>210</sup> the form of the *Miranda* warning on February 27, when compared to March 1, raises the compelling question of what constitutes a valid *Miranda* warning. The February 27 warning is identical—word for word—to the warning approved by the Supreme Court’s 1989 decision in *Duckworth v. Eagan*.<sup>211</sup>

Although the warnings given in *Duckworth* and Dassey’s February 27 stationhouse interrogation are the same, the suspects were not. Unlike Dassey, the defendant in *Duckworth* was an adult.<sup>212</sup> Accordingly, the Court did not have occasion to consider the impact of such a complex warning on a juvenile suspect with cognitive deficiencies. That distinction more than matters.

Scholars have written about juveniles’ inability to exercise or even understand their *Miranda* rights.<sup>213</sup> Thomas Grisso, for example, studied

207. Transcript of Brendan Dassey Two Rivers Police Dept. Interview, *supra* note 3, at 484.

208. *Miranda*, 384 U.S. at 490.

209. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL. & L. 63, 68 (2008) (“With many juvenile offenders having limited verbal abilities and academic skills, the comprehensibility of juvenile *Miranda* warnings is essential.”).

210. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 209, 214.

211. 492 U.S. 195, 198 (1989).

212. The opinion does not indicate the defendant’s age although a news article discussing the Supreme Court’s opinion in *Duckworth* referred to the defendant as “a Chicago-area man.” Al Kamen, *Police May Change Wording of Miranda Warning, Justices Say*, WASH. POST (June 27, 1989), <https://www.washingtonpost.com/archive/politics/1989/06/27/police-may-change-wording-of-miranda-warning-justices-say/c345cf90-672f-43f8-b884-0dff371bfea2/> [https://perma.cc/4FPF-7KDX].

213. E.g., Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 408–09 (2013).

juveniles' exercise of *Miranda* rights for more than three decades.<sup>214</sup> Alarming, he learned that “[h]alf (55.3%) of juveniles, as contrasted with less than one-quarter (23.1%) of adults, did not understand at least one of the warnings and only one-fifth (20.9%) of juveniles, as compared with almost half (42.3%) of adults, grasped the entire warning.”<sup>215</sup> Another study concluded that “[a]ccess to free legal services and the option to consult with a parent or guardian generally require at least a 10th-grade education.”<sup>216</sup> And even if the juvenile understands the warning, juvenile suspects generally “do not fully appreciate the function or importance of rights, or view them as an entitlement, rather than as a privilege that authorities allow, but which they may unilaterally withdraw.”<sup>217</sup>

With those studies in mind, the judiciary is justifiably concerned about the prospect of juvenile suspects both comprehending and exercising their *Miranda* rights.<sup>218</sup> Various efforts to address those concerns exist. Massachusetts, for example, follows the “interested adult” rule which enables a juvenile suspect to consult an interested adult to assist him or her with effectively understanding and exercising their rights.<sup>219</sup> According to the Massachusetts Appeals Court, that rule exists because “most juveniles do not fully understand the significance of *Miranda* warnings when they hear them, and further, . . . juveniles often lack the capacity to fully appreciate the consequences of their actions.”<sup>220</sup> Alternative approaches to the interested adult rule include statutory or judiciary protections.<sup>221</sup>

Putting aside those various approaches, no separate protections existed for Dassey to ensure that he understood his *Miranda* rights. Rather, the acquisition of Dassey’s waiver ended in a manner similar to the February 27 stationhouse

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214. See Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1134 (1980).

215. Feld, *supra* note 213, at 408–09 (citing Grisso, *supra* note 214, at 1152–54).

216. Rogers, *supra* note 209, at 78.

217. Feld, *supra* note 213, at 410.

218. *E.g.*, State *ex rel.* S.H., 293 A.2d 181, 184–85 (N.J. 1972) (describing the reading and explaining of *Miranda* rights to a ten-year-old “undoubtedly meaningless” as he would not have the capacity to fully understand his rights).

219. Commonwealth v. Pacheco, 28 N.E.3d 1172, 1179 (Mass. App. Ct. 2015).

220. *Id.*

221. State v. Saldierna, 794 S.E.2d 474, 477 (N.C. 2016); see *In re H.V.*, 252 S.W.3d 319, 326–27 (Tex. 2008) (holding that a sixteen-year-old properly invoked his right to counsel when he stated he “wanted his mother to ask for an attorney”); United States v. Doe, 170 F.3d 1162, 1167 (9th Cir. 1999) (holding that a juvenile’s parent must contemporaneously receive notice that the juvenile is in custody and of the juvenile’s *Miranda* rights); Lewis v. State, 288 N.E.2d 138, 141–42 (Ind. 1972), *superseded by statute*, Pub. L. No. 1-1997 (codified as amended at IND. CODE § 31-32-5-1 (2018)) (requiring parents or guardians to be informed of a child’s rights).

interrogation. Wiegert asked after providing the rights, “Do you know and understand each of these rights, your rights, which I have explained?”<sup>222</sup> Dassey replied only, “Yeah” and, like the February 27 stationhouse interrogation, immediately begins answering questions.<sup>223</sup> As the Supreme Court made clear in *Edwards v. Arizona*, his doing so is problematic.<sup>224</sup> Indeed, a suspect’s one word acknowledgement of the warnings followed by immediately beginning to answer questions does not reflect a voluntary, knowing, and intelligent waiver.<sup>225</sup>

Collectively, all three of these real-life examples—of *Miranda* custody, misused interrogation methods in action, and of *Miranda* waiver—provide rich sources for use and discussion in the investigative criminal procedure classroom.

#### 4. An unconsidered legal consequence

Dassey’s age and background may matter in one other context: a 2004 Supreme Court case called *Missouri v. Seibert*.<sup>226</sup> In *Seibert*, Donald Rector and Jonathan Seibert died in a mobile home fire on February 12, 1997, in Rolla, Missouri.<sup>227</sup> Five days after the fire, investigators interrogated Jonathan’s mother, Patrice, to determine her involvement in the fire.<sup>228</sup> During the first of two interrogations, officers at the outset intentionally avoided giving Patrice her *Miranda* warnings.<sup>229</sup> After Patrice made incriminating statements, including that “Donald was meant to die in the fire,” she received a twenty minute break, after which officers initiated a second interrogation.<sup>230</sup> This time,

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222. Transcript of Brendan Dassey Manitowoc Cty. Sheriff’s Dept. Interview, *supra* note 3, at 526.

223. *Id.* at 526–27.

224. *Edwards v. Arizona*, 451 U.S. 477, 480, 487 (1981).

225. *Id.* at 484–85 (“[H]aving expressed his desire to deal with the police only through counsel, [the accused] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”).

226. 542 U.S. 600, 600 (2004).

227. *State v. Seibert*, 93 S.W.3d 700, 701 (Mo. 2002).

228. *Id.* at 702.

229. *Seibert*, 542 U.S. at 604–05.

230. *Id.* at 605.

however, Seibert received her *Miranda* warnings after which she repeated her incriminating statements.<sup>231</sup>

A plurality of the Supreme Court in *Missouri v. Seibert* condemned the interrogators' tactics.<sup>232</sup> In doing so, it suppressed both Seibert's first and second incriminating statements as the unconstitutional product of what the plurality called a "question first and warn later" approach.<sup>233</sup> Yet the Court left open the prospect that statements obtained in other sequential confession cases could be admissible, noting that "when interrogators question first and warn later [we asked] whether it would be reasonable to find that . . . the warnings could function 'effectively' as *Miranda* requires."<sup>234</sup>

*Seibert* is frustratingly complex, but we can say this much: the Court disapproved of a particular two-step approach to *Miranda*.<sup>235</sup> That is, the Court prohibited the practice of obtaining incriminating statements prior to giving the suspect *Miranda* warnings, administering *Miranda* warnings, and then obtaining those same statements.<sup>236</sup> The question in *Seibert* was not whether the suspect's unwarned incriminating statements were admissible—they were not—but rather whether the post-warning statements were separately admissible.<sup>237</sup> Those statements, better known as the fruits of a *Miranda* violation, would ordinarily be admissible.<sup>238</sup> *Seibert* therefore stands as an exception to the ordinary rule that administering *Miranda* warnings to a suspect suffices to remove the conditions that precluded admission of the unwarned statement.

The question in a *Seibert*-like fact pattern is whether administration of midstream *Miranda* warnings is effective.<sup>239</sup> To make that determination, the *Seibert* Court advised consideration of the following factors: "(1) completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and the second interrogations, (4) the continuity of police personnel, (4) the degree to which the interrogator's questions treated the second round as continuous with the first," and (5) whether the police advised the suspect that her prior statement could not be used.<sup>240</sup>

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231. *Id.*

232. *Id.* at 614, 616–17.

233. *Id.* at 611–12.

234. *Id.*

235. *Id.* at 612–14.

236. *Id.* at 612–13.

237. *Id.* at 604, 617.

238. *Id.* at 614–15.

239. *Id.* at 615.

240. *Id.* at 615–16.



I have long wondered about *Seibert* as a tool to argue for suppression of Dassey's March 1 statements.<sup>241</sup> That is, to argue that his March 1 statements were the unconstitutional fruits of prior unwarned interrogations—in Dassey's case, the first February 27 schoolhouse interrogation and, possibly, the hotel interrogation that took place that night. Many of the *Seibert* factors are, after all, in play. Among them, Wiegert and Fassbender clearly think on March 1 that they are covering ground previously covered in prior interrogations, they make several references to their prior conversations, and Dassey repeats many of the exact same statements he initially offered in his first interview. Although the time between interrogations is considerably longer than in *Seibert*, we are left to wonder about when the hotel interrogation occurred alongside what role age and educational background might play in an updated *Seibert* analysis. Of course, the same two officers interrogated Dassey four times and, in doing so, they did not advise him that his statements at the schoolhouse on February 27 could not be used against him.

Admittedly, *Seibert* is an imperfect tool to reexamine the Dassey interrogations. But two things are clear: first, Dassey's case offers yet another dynamic illustration of *Miranda* doctrine for use in the classroom. Second, the facts of his case have encouraged reconsideration of the due process voluntariness test for juveniles; there's no reason it cannot do the same for other areas of the law like *Miranda*'s exclusionary rule.

#### IV.

There exists one other major reason—a reason aside from the interrogations, that is—for Dassey's conviction: bad lawyering. Section A explains *Strickland v. Washington*,<sup>242</sup> one of the worst Supreme Court decisions in history. Decided in 1984, *Strickland* governs what constitutes adequate defense representation pursuant to the Sixth Amendment.<sup>243</sup> In doing so, it explores the story of William Tunkey—the attorney at the heart of the *Strickland* story. Section B then considers five critical months where Leonard “Len” Kachinsky was appointed to represent Dassey. It focuses on three main events: (1) Kachinsky's decision to permit law enforcement to interrogate Dassey outside of Kachinsky's presence on May 13, 2006; (2) reliance on an outside defense “expert” who sought to induce a confession from Dassey; and

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241. I do not think I am alone in this curiosity. Dassey's post-conviction lawyers hinted during the hearing on Dassey's habeas motion that the February 27 and March 1 interrogations could be related. Len Kachinsky, Dassey's lawyer for the motion to suppress, was asked whether he thought the February 27 interrogation “would impact the legality or the admissibility of the March 1 statement.” Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 215. Kachinsky replied that “the intervening events were so strong that any spillover or prejudice was probably nonexistent.” *Id.*

242. See *infra* notes 247–76 and accompanying text.

243. *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

(3) Kachinsky's concession as part of his motion to suppress that Dassey was not in custody for purposes of *Miranda* during any of his interrogations. Section B makes the sad but perhaps obvious conclusion that Kachinsky is today's William Tunkey.

To illustrate *Strickland*'s inability to demand more from the defense bar, Section C reviews the upsetting state appellate judiciary's analysis of Kachinsky's deplorable defense representation. The conclusion by two different state courts that Kachinsky provided constitutionally adequate representation masks a powerful reality: meaningful change to the expectations of defense lawyers lies in the hands of law schools—and law professors—nationwide. Section C contends that where the Supreme Court has failed, law schools must succeed. That is, law schools must ignore the low bar set by *Strickland* in favor of demanding more from students. Kachinsky's conduct reveals the potentially disastrous consequences should law schools not accept this challenge.

#### A. A Primer on Attorney Performance

Put candidly, little is required for a defense attorney to be characterized as constitutionally competent. The source for judging defense attorney effectiveness stems from the Sixth Amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>244</sup> Despite numerous Supreme Court right-to-counsel holdings indicating when an indigent defendant qualifies for an attorney at the state's expense, the law prior to 1984 was unclear on how that attorney delivered constitutionally satisfactory criminal defense representation. For example, neither *Gideon v. Wainwright*,<sup>245</sup> nor *Douglas v. California*<sup>246</sup>—both of which provided indigent defendants with appointed counsel at different procedural stages—says anything about the minimum quality of attorneys appointed to represent clients during those procedural events.

The Supreme Court, for its part, admitted that the issue presented when it accepted *Strickland v. Washington* in 1983 was novel.<sup>247</sup> In 1984, when *Strickland* was decided, the Court held that a defendant receives constitutionally unacceptable representation when (1) counsel's representation falls below an objective standard of reasonableness that (2) prejudiced the defense, and therefore had an effect on the judgment.<sup>248</sup>

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244. U.S. CONST. amend. VI.

245. 372 U.S. 335 (1963).

246. 372 U.S. 353 (1963).

247. Docket, *Strickland*, 466 U.S. 668 (No. 82-1554); *Strickland*, 466 U.S. at 686.

248. *Strickland*, 466 U.S. at 687.

As the years since *Strickland* have overwhelmingly demonstrated, the bar set by the Supreme Court for defense lawyering is low. That lower courts do not expect much from defense attorneys is unsurprising given that *Strickland* itself approved of alarming defense attorney behavior. Indeed, the lawyer in *Strickland*, William Tunkey, failed his client, David Washington, in several ways. Washington, who was facing the death penalty, embarked on a ten-day crime spree in 1976 that included three murders.<sup>249</sup> At the time he represented Washington, Tunkey was a private attorney with considerable criminal experience.<sup>250</sup> But things went south very early in their professional relationship after Washington ignored Tunkey's advice not to speak with police and confessed to two of the killings.<sup>251</sup> Although Tunkey initially filed several suppression motions on behalf of Washington, he abandoned those motions in dramatic fashion on the day Washington changed his pleas to guilty.<sup>252</sup> Similar to Kachinsky, Tunkey expressly waived some of Washington's best issues, telling the court that, as to his *Miranda*-related waiver arguments, "it is my considered judgment that there was a free and voluntary waiver of counsel in each case. There was a waiver of his various constitutional rights to remain silent, to the assistance of counsel, et cetera."<sup>253</sup>

By the time of Washington's sentencing hearing just five days later, Tunkey would admit, "I had a hopeless feeling. There is no question about that."<sup>254</sup> He added, "I can honestly say that I don't know that I felt that there was anything which I could do which was going to save David Washington from his fate."<sup>255</sup> As a result of those emotions, Tunkey did not request a continuance from the court to give him additional time to prepare.<sup>256</sup> He also did not request a presentence report and otherwise did little to save Washington's life.<sup>257</sup> He submitted a sentencing memorandum that spanned just five pages, cited no cases, and conceded the applicability of two aggravating circumstances.<sup>258</sup> Tunkey then did not put on a case at the sentencing hearing itself, choosing instead to rely on his sentencing memorandum and testimony from Washington

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249. *Id.* at 671–72.

250. *Id.* at 672.

251. *Id.*

252. *Id.*

253. Joint Appendix at 23, *Strickland*, 466 U.S. 668 (No. 82-1554).

254. *Id.* at 384.

255. *Id.* at 400.

256. *Id.* ("As far as the time between the entry of the plea and affirmatively and aggressively moving for a continuance really occurred to me.").

257. *Id.* at 405.

258. *Id.* at 332–37.

at the change of plea hearing.<sup>259</sup> As the sentencing process unfolded, Tunkey never had Washington—who had no prior criminal record—examined by a psychologist or psychiatrist.<sup>260</sup> At a hearing on Washington’s subsequent federal habeas petition, Tunkey testified that his decision not to seek a presentence report was a “lack of forethought” and was not “a matter of trial strategy.”<sup>261</sup>

Yet the Supreme Court upheld Tunkey’s abysmal representation of Washington as constitutionally adequate.<sup>262</sup> Writing for a majority of the Court, Justice O’Connor in *Strickland v. Washington* announced a new two-part standard for judging the reasonableness of a defense attorney’s representation.<sup>263</sup> First, said the Court, a defendant must show that counsel’s performance was “deficient.”<sup>264</sup> That, in turn, “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>265</sup>

In addressing how to evaluate when counsel falls below an objective performance threshold, the Court indicated that “prevailing professional norms” help.<sup>266</sup> Citing American Bar Association standards as an example, the Court noted that counsel must maintain the duty of loyalty, a duty to avoid conflicts, a duty to advocate the defendant’s cause, and a duty to “bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”<sup>267</sup> The standard is, however, “highly deferential” and, accordingly, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>268</sup>

Second, the defendant must provide “prejudice”; that is, “that the deficient performance prejudiced the defense.”<sup>269</sup> The prejudice standard, a challenging one to satisfy, “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”<sup>270</sup> Stated

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259. *Id.* at 101, 313.

260. *Id.* at 384–85.

261. *Id.* at 405.

262. *Strickland v. Washington*, 466 U.S. 668, 670, 699, 701 (1984).

263. *Id.* at 687.

264. *Id.*

265. *Id.*

266. *Id.* at 688.

267. *Id.* (citations omitted).

268. *Id.* at 689 (citation omitted).

269. *Id.* at 687.

270. *Id.*

differently, the Court wrote, prejudice requires a defendant to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>271</sup>

After explaining the new law, the Court turned its attention to applying the two-part standard to Tunkey’s representation of Washington. Justice O’Connor for the majority brazenly commented that it “is not difficult in this case” to conclude “that the conduct of respondent’s counsel at and before respondent’s sentencing proceeding cannot be found unreasonable.”<sup>272</sup> As to the first prong, the *Strickland* Court held that Tunkey’s performance was objectively reasonable. Although it conceded that Tunkey felt “hopeless,” Justice O’Connor wrote that “nothing in the record indicates . . . that counsel’s sense of hopelessness distorted his professional judgment.”<sup>273</sup>

“[T]he lack of merit of [Washington’s] claim is even more stark,” wrote the Court about the prejudice prong.<sup>274</sup> Any evidence that Tunkey failed to present at the sentencing hearing, the Court reasoned, “would barely have altered the sentencing profile presented to the sentencing judge.”<sup>275</sup> But more to the point, said the Court, the evidence of Washington’s guilt was so overwhelming that no level of attorney incompetence could create the requisite prejudice.<sup>276</sup>

In many ways, the story of how the judiciary evaluated Len Kachinsky’s representation of Brendan Dassey is merely another chapter in a long and sad book of intolerable defense representation that *Strickland* views as constitutionally acceptable.

### B. *Kachinsky’s Representation*

Len Kachinsky was appointed to represent Dassey on March 7, 2006.<sup>277</sup> Kachinsky replaced Ralph Sczygelski who withdrew just hours following

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271. *Id.* at 694.

272. *Id.* at 698.

273. *Id.* at 699.

274. *Id.*

275. *Id.* at 700.

276. *Id.* (“Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.”).

277. *Dassey v. Dittmann*, 201 F. Supp. 3d 963, 975 (E.D. Wis. 2016), *overruled by* 877 F.3d 297 (7th Cir. 2017) (en banc). Manitowoc County Circuit Judge Jerome Fox, who presided over Dassey’s case, signed the appointment, which originated from the Office of the State Public Defender. John Lee, *Kachinsky to Represent Dassey*, POST CRESCENT (Jan. 7, 2016, 6:13 PM), <https://www.postcrescent.com/story/news/local/steven-avery/2016/01/07/kachinsky-represent-dassey/78437970/> [<https://perma.cc/3VJ4-8NMV>]. Kachinsky was on a list maintained by the state public defender of private attorneys certified to accept criminal cases involving indigent defendants. *See* WIS. ADMIN. CODE PD § 2.06 (May 2010). The Wisconsin legislature vests discretion in the

Dassey's initial appearance upon learning that he, Sczygelski, was a distant relative of Halbach.<sup>278</sup> At the time of his appointment, Kachinsky boasted that he "served as a prosecutor or defense counsel in more than 250 jury trials, and represented clients in more 350 appeals in state and federal courts."<sup>279</sup>

But that experience, even if accurate, hardly translated into zealous advocacy. Kachinsky did not meet with Dassey until March 10—three days after his appointment—though he did find time to speak with the media.<sup>280</sup> In one of several interviews Kachinsky gave before even meeting Dassey or reviewing the interrogation tapes, Kachinsky was quoted as saying, "We have a 16-year-old who, *while morally and legally responsible*, was heavily influenced by someone that can only be described as something close to evil incarnate."<sup>281</sup> In another interview, he thought he was "stating the obvious" by indicating that Dassey would be convicted based on the content of his confession.<sup>282</sup> Indeed, at the time Kachinsky made those statements, he had only seen the criminal complaint.<sup>283</sup> In those early days, as he gave numerous interviews, he meanwhile did very little on Dassey's case—logging just a few case-related phone calls.<sup>284</sup>

After finally meeting with Dassey for roughly an hour on March 10, Kachinsky promptly gave yet another interview in which he said that Dassey was "sad, remorseful, and overwhelmed by the charges against him."<sup>285</sup> He also commented at that time that he was not ruling out a guilty plea.<sup>286</sup> When asked later why he gave so many interviews, Kachinsky commented:

I knew that Brendan's family was watching these news casts, and so in effect in some ways it was a message that was, um, sent to them, uh, to try to get them accustomed to the idea that Brendan might take a legal option that they don't like and try to explain why he would do that and, perhaps, to cut down on

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public defender to assign cases to private counsel on an as-needed basis. WIS. STAT. § 977.08(3)(f) (2017–2018).

278. Lee, *supra* note 277.

279. *Id.* Kachinsky's claims aside, he graduated from the University of Wisconsin Law School in 1978. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 113. He served as a JAG officer for four years after which he entered private practice but remained in the Army Reserve. *Id.* He retired from the Army Reserve in July 2007. *Id.*

280. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 114.

281. *Id.* at 116 (emphasis added).

282. *Id.* at 122–23.

283. *Id.* at 123.

284. *Id.* at 126.

285. *Id.* at 131.

286. *Id.* at 134.

possible interference from his family.<sup>287</sup>

After meeting with Dassey on March 10, Kachinsky continued to make the media rounds. Although Dassey during their meeting asserted his innocence, Kachinsky for the next several days did no work on Dassey's case.<sup>288</sup> He instead talked to local reporters, Court TV, and Dateline NBC.<sup>289</sup>

Dassey made an appearance in court on March 17—the same day Kachinsky appeared on The Nancy Grace show.<sup>290</sup> While on that show, he told viewers that if the confession was accurate, “there is, quite frankly, no defense.”<sup>291</sup> But Kachinsky, at the time of that statement, still had not reviewed Dassey's statements to law enforcement.<sup>292</sup> Kachinsky's commitment to the press continued in the days that followed; he had more conversations with Dateline and other assorted local media.<sup>293</sup> Meanwhile, Kachinsky had to this point taken no action on Dassey's comment during their March 10 meeting that his March 1 statement was inaccurate and that he wanted to take a polygraph to prove it.<sup>294</sup> Moreover, although the prosecution made discovery available to Kachinsky, he did not make copies of all available material because, in his words, he could not see “any use” for it.<sup>295</sup>

By March 25, Kachinsky made limited time to listen to some of the March 1 interrogation.<sup>296</sup> Without the benefit of consulting an interrogation expert, he characterized the methods employed by investigators as “pretty standard and quite legitimate.”<sup>297</sup> In Kachinsky's opinion, the investigators on February 27 and March 1 took “great pains to try to make the details in that interview come out from—from Brendan and not something that was suggested by them.”<sup>298</sup>

In any event, additional media appearances ensued during the following days, though little work on Dassey's case was done. On March 30, for example, Kachinsky's entire work on the Dassey case consisted of a single email exchange with a local reporter.<sup>299</sup> Then, on March 31, his workday comprised of two emails with a local reporter followed by an interview with a separate

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287. *Id.* at 136–37.

288. *See id.* at 139.

289. *Id.* at 139–41.

290. *Id.* at 141–42.

291. *Id.* at 142.

292. *Id.* at 144–45.

293. *Id.* at 150, 153.

294. *Id.* at 152.

295. *Id.* at 156.

296. *Id.* at 163.

297. *Id.* at 170–71.

298. *Id.* at 176.

299. *Id.* at 173–74.

local television station.<sup>300</sup> The April 2 workday was comprised of Kachinsky sending a single email to the press and having a phone conference with a television reporter.<sup>301</sup> During one interaction with the press, Kachinsky said that “Brendan has a reasonably good ability to recall events he participated in.”<sup>302</sup> In total, over roughly the first three weeks of representing Dassey, Kachinsky would spend at least ten hours communicating with the press but just one hour with his client.<sup>303</sup> Meanwhile, Kachinsky communicated to Dassey that his chances of winning a motion to suppress the March 1 confession “were not terribly good.”<sup>304</sup>

Kachinsky next saw Dassey in person on April 3.<sup>305</sup> The pair met together for roughly an hour and fifteen minutes, during which time Dassey made a second request to take a polygraph exam.<sup>306</sup> Apparently in an effort to fulfill Dassey’s request, Kachinsky looked up polygraph examiners on the internet and, without looking into his background, contacted a man named Michael O’Kelly.<sup>307</sup> Kachinsky then wrote a letter to Dassey indicating that he had identified a polygraph examiner, but he added:

But, once again, the videotape is pretty convincing that you were being truthful on March 1. You need to stop thinking about who benefits from what you say and just think about what really happened.

If a judge or jury thinks you are lying, cover up for Steve or yourself, you are writing yourself a sentence to life imprisonment without parole.

If you accept responsibility for what you did and cooperate in Steve’s case, at least one of the Halbachs will ask Judge Fox to go relatively easy on you.<sup>308</sup>

Kachinsky’s pattern of talking to the press while performing little work on Dassey’s case continued.<sup>309</sup> He did little to review available discovery,<sup>310</sup> had

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300. *Id.* at 174.

301. *Id.* at 182.

302. *Id.* at 183.

303. *Id.* at 183.

304. *Id.* at 177.

305. *Id.* at 183.

306. *Id.* at 185–86.

307. *Id.* at 187–88.

308. *Id.* at 189–90.

309. *Id.* at 191.

310. *Id.* at 192–93.



not retained his own investigator,<sup>311</sup> and did not focus on statements Dassey made other than what he said on March 1.<sup>312</sup>

On April 16, O’Kelly performed a polygraph examination on Dassey.<sup>313</sup> Although the results were inconclusive,<sup>314</sup> O’Kelly nonetheless relayed to Kachinsky that he thought Dassey “was a kid without a conscience.”<sup>315</sup> Despite O’Kelly’s view of Dassey and despite Dassey’s claims of innocence, Kachinsky elected to hire O’Kelly as his investigator,<sup>316</sup> and the pair worked together to get Dassey to cooperate with the prosecution.<sup>317</sup> Kachinsky filed a motion to suppress on Dassey’s behalf on April 19, arguing only that Dassey’s statements on March 1 were involuntary; he made no *Miranda*-related arguments.<sup>318</sup>

To bolster their efforts to have Dassey cooperate with the prosecution, Kachinsky decided to have O’Kelly re-interview Dassey.<sup>319</sup> Kachinsky’s goal, he hoped, was to have O’Kelly develop information that would be helpful to the prosecution.<sup>320</sup> Doing so, Kachinsky thought, would both make clear to Dassey that a jury would find him guilty and, as a result, pleading guilty was the only appropriate path forward.<sup>321</sup> Kachinsky set May 12 as the date for O’Kelly to interview Dassey.<sup>322</sup> On that date, Kachinsky thought, Dassey would be particularly vulnerable because he anticipated losing the motion to suppress.<sup>323</sup>

The suppression hearing occurred on May 9. Before the substance of the hearing commenced, Kachinsky conceded that Dassey was not in custody either during the February 27 stationhouse interrogation or the March 1 stationhouse interrogation.<sup>324</sup> (The November 6, 2006 roadside interrogation and the other two February 27 interrogations all went unmentioned.) Kachinsky specifically told the court:

[B]ased on the review of those [March 1] tapes, uh, and the

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311. *Id.* at 193.

312. *Id.* at 209.

313. *Id.*

314. *Id.* at 210.

315. *Id.* at 212.

316. *Id.* at 213.

317. *Dassey v. Dittmann*, 201 F. Supp. 3d 963, 977 (E.D. Wis. 2016), *overruled by* 877 F.3d 297 (7th Cir. 2017) (en banc).

318. Motion to Suppress, *supra* note 176, at 6–9.

319. *Dassey*, 201 F. Supp. 3d at 977.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Transcript of Motion Hearing, *supra* note 2, at 6–7.

transcripts, and also consultations with my client, investigator, and other witnesses, uh, the question of whether or not this is a custodial interrogation is not, uh, at issue in this case. It's not a custodial, uh, interrogation, although, the, uh, giving of the *Miranda* rights, or failure to do the same during portions of the, uh, statements, would be relevant in determining voluntariness.<sup>325</sup>

The court replied, "So -- so, *Miranda* warnings are not an issue, or Mirandizing is not an issue here, neither is the -- the custodial or noncustodial nature of the-- of the -- of the, uh, interviews. All right."<sup>326</sup>

After the hearing, O'Kelly sent an email to Kachinsky on May 9 condemning the Avery family.<sup>327</sup> He wrote in part that the Averys "are criminals" and that he could "find no good in any member."<sup>328</sup> As for the upcoming Dassey interview, he advised Kachinsky not to attend:

I think that your visit will be counterproductive to our goals for Brendan. . . . Brendan needs to be alone. When he sees me this Friday I will be a source of relief. He and I can begin to bond. He needs to trust me and the direction that I steer him into. Brendan needs to provide an explanation that coincides with the facts/evidence.

I would like to obtain his confession this Friday. Brendan should provide details of the crime scene and data that has been previously undisclosed that mirrors the crime scene data.<sup>329</sup>

Kachinsky replied that he would not attend and, as he predicted, the court denied his suppression motion on May 12.<sup>330</sup>

O'Kelly then proceeded to videotape an interview of Dassey in a room at the detention center where Dassey was held.<sup>331</sup> O'Kelly began by presenting Dassey with a variety of pictures, images, and props.<sup>332</sup> O'Kelly, for example, showed Dassey photos of Halbach, the Avery property, a photo of Halbach's church, and a missing person poster for Halbach.<sup>333</sup> He then told Dassey that

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325. *Id.* at 6.

326. *Id.* at 7.

327. E-mail from Michael J. O'Kelly, Private Investigator, to Len Kachinsky, Defense Counsel, Sisson and Kachinsky Law Office (May 9, 2006, 10:11 PM).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Dassey v. Dittmann*, 201 F. Supp. 3d 963, 977 (E.D. Wis. 2016), *overruled by* 877 F.3d 297 (7th Cir. 2017) (en banc).

332. *Id.* at 977–78.

333. *Id.*

Dassey's polygraph results indicated "deception," though Dassey was confused and replied, "That I passed it?"<sup>334</sup> Once Dassey realized that he failed, O'Kelly confronted Dassey and said, "The two things I don't know is, are you sorry for what you did and will you promise not to do it again. Those are the two things I don't know. I know everything else that I need to about this case except for those two things. . . . Are you sorry?"<sup>335</sup>

Dassey maintained his innocence for the first portion of the interview.<sup>336</sup> But O'Kelly continued to press him. He threatened Dassey that, unless he was sorry, he would spend the rest of his life in prison.<sup>337</sup> Dassey's story began to evolve into a story similar to what he told investigators on March 1, though portions of the timeline Dassey provided on March 1 had changed.<sup>338</sup> Regardless, at the interview's conclusion, O'Kelly believed that Dassey was "on board with cooperating in the Avery prosecution and, ultimately, entering a plea agreement."<sup>339</sup> Although Kachinsky never watched O'Kelly's interview, he permitted O'Kelly to speak with investigators about what Dassey said during their private interview.<sup>340</sup>

After the O'Kelly interview, Kachinsky scheduled a "free interview" for the state on May 13.<sup>341</sup> The strategy, according to Kachinsky, was for Dassey to provide missing evidence that would help with the Avery prosecution.<sup>342</sup> With no immunity or other consideration discussed, Kachinsky specifically arranged for the state to interrogate Dassey again—without Kachinsky present.<sup>343</sup> Kachinsky moreover had no discussion with the prosecution before the interrogation "about the admissibility or future use" of the use of Dassey's statement.<sup>344</sup> And in his place, Kachinsky left O'Kelly to supervise Dassey's interrogation from a separate room, although Kachinsky told O'Kelly not to interrupt the interrogation unless Dassey asked for it to stop.<sup>345</sup>

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334. *Id.* at 978.

335. *Id.*; Transcript of Post-Conviction Motion Hearing Day 2 at 16, *State v. Dassey*, NO. 06 CF 88 (Manitowoc Cty. Ct. 2010).

336. *Dassey*, 201 F.Supp. 3d at 978.

337. *Id.*; Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 18.

338. *Dassey*, 201 F. Supp. 3d at 978.

339. *Id.*

340. *Id.*; Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 31.

341. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 34.

342. *Id.* at 36; E-mail from Len Kachinsky, Defense Counsel, to Tom Fassbender, Special Agent, Wisconsin Dept. of Justice (May 12, 2006, 9:19 PM).

343. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 36–37.

344. *Id.* at 37–38.

345. *Id.* at 38–39.

Wiegert and Fassbender again led the May 13 interrogation, which they began by advising Dassey of his *Miranda* warnings.<sup>346</sup> The pair again sought to have Dassey tell them what happened to Halbach on October 31, 2005.<sup>347</sup> As Dassey relayed the details, many of them differed from the story he told on March 1.<sup>348</sup> He, for example, changed his story on a number of key issues, including about whether he cut Halbach's hair, shot her, cut her throat, and seeing Halbach's personal items in a burn barrel.<sup>349</sup>

Wiegert and Fassbender grew frustrated. They told him they would leave the room if Dassey would not tell the truth.<sup>350</sup> When that threat proved unproductive, Wiegert took a different approach. Wiegert told Dassey that his mother would be upset to learn that Dassey was being untruthful with him.<sup>351</sup> He specifically commented, "I haven't called her yet to tell her that you lied to me, but I will do that, what do you think she's gonna say to you? She's gonna be mad."<sup>352</sup> Knowing that jail calls were recorded, Wiegert then suggested to Dassey that he call his mother so she could hear the truth directly from him.<sup>353</sup> Dassey agreed,<sup>354</sup> though Kachinsky knew nothing about it.<sup>355</sup>

When Dassey called his mother, Barbara Janda, from jail later that day, their call was indeed recorded.<sup>356</sup> Dassey told Janda at the outset that "Mark & Fassbender are gonna talk to you."<sup>357</sup> He proceeded to tell her "that Mike guy came up here and talked to me about my results."<sup>358</sup> In discussing what "Me & Steven did that day,"<sup>359</sup> he said, "Mike & Mark & Matt came up one day and took another interview with me and said because they think I was lying but so, they said if I came out with it that I would have to go to jail for 90 years."<sup>360</sup>

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346. Transcript of Calumet Cty. Sheriff's Dept. Interview of Brendan Dassey at 757–58, State v. Dassey, No. 06 CF 88 (Manitowoc Cty. Ct. May 13, 2006).

347. *See id.* at 759.

348. The district court relayed in detail how Dassey's May 13, 2006, story compares to the one he told on March 1, 2006. Dassey v. Dittmann, 201 F. Supp. 3d 963, 979–80 (E.D. Wis. 2016), *overruled by* 877 F.3d 297 (7th Cir. 2017) (en banc).

349. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 41–43.

350. Transcript of Calumet Cty. Sheriff's Dept. Interview of Brendan Dassey, *supra* note 346, at 764.

351. *Id.* at 792–93.

352. *Id.* at 793.

353. *See id.* at 822–23.

354. *Id.* at 823.

355. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 45.

356. *Phone Call Brendan & Mom*, *supra* note 23, at 1.

357. *Id.*

358. *Id.*

359. *Id.* at 2.

360. *Id.*

But, he added, “if I come out with it I would probably get I dunno about like 20 or less.”<sup>361</sup> Janda asked later, “Was your attorney there when Mark and those guys were?”<sup>362</sup> When Dassey replied, “No,” Janda advised him to stop talking and added, “They are putting you in places where you’re not.”<sup>363</sup> She insightfully added, “what your attorney should be doing is putting an order on all of them that they cannot interfere with you or your family members unless your attorney is present.”<sup>364</sup>

Months later, on August 14, 2006, the State Public Defender’s office sent Kachinsky a letter.<sup>365</sup> It read, in part, as follows:

[Director of the Assigned Counsel Division, Deborah Smith] is recommending that you be decertified from the Class A felony appointment list and the Trial 3, Class B–D felony list. Her recommendation is based on your failure to provide competent representation in the Brendan Dassey case. You have confirmed to her that you allowed law enforcement to interview your client on May 13, 2006 in your absence. You’ve confirmed to her that you were not present at the interview on May 13, 2006 because you had to attend army reserve training that weekend. It is difficult to imagine a situation when it would be appropriate to allow a client in a serious felony case to give a statement in the attorney’s absence. To allow such an interview in this case is indefensible.<sup>366</sup>

The letter further notified Kachinsky that he would no longer be appointed to Class A felony cases.<sup>367</sup> A copy of the letter was also provided to the trial judge, Jerome Fox, and Kachinsky filed a motion to withdraw as counsel.<sup>368</sup> Judge Fox conducted a hearing on Kachinsky’s motion on August 25.<sup>369</sup> Kachinsky’s “failure to be present while his client gave a statement to investigators,” said the court at the hearing, “constituted deficient performance

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361. *Id.*

362. *Id.* at 7.

363. *Id.*

364. *Id.*

365. Transcript of Motion Hearing at 4–5, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. Aug. 25, 2006).

366. *Id.* at 4.

367. *Id.* at 5.

368. *Id.* at 5–6.

369. *Id.* at 1.

on Attorney Kachinsky's part."<sup>370</sup> The court therefore granted Kachinsky's motion.<sup>371</sup>

*C. Len Kachinsky Is the New William Tunkey*

The parallels between William Tunkey and Len Kachinsky cannot be ignored. Tunkey, you'll recall, admitted to feeling "hopeless" about David Washington's case and likewise admitted that much of his efforts did not qualify as sound trial strategy.<sup>372</sup> Whereas Tunkey's expression of hopelessness was both overt and open, Kachinsky's display of hopelessness was more tacit. Kachinsky's entire strategy, after all, was designed to have Dassey plead guilty and assist the prosecution.<sup>373</sup> Though perhaps more veiled, Kachinsky's representation was just as damaging to Dassey's case as Tunkey's decision-making was to Washington.

A handful of other strikingly similar parallels between the two attorneys exist. Consider: both Tunkey and Kachinsky conceded viable *Miranda*-related issues,<sup>374</sup> and neither Tunkey nor Kachinsky secured subject-specific experts to assist their clients. In David Washington's case, Tunkey did not seek a psychiatric or psychological evaluation for Washington. To the contrary, Tunkey self-assessed Washington as "sane."<sup>375</sup> But in Tunkey's post-conviction hearing testimony, he admitted, "Maybe I should have because [Washington] said he had been out of work for six months and he had impressed me as being sincerely concerned for the welfare of his wife and child."<sup>376</sup> He also commented, "I did not think at the time to go ahead and utilize psychiatric or psychological experts . . . I did not think of that."<sup>377</sup>

Like Tunkey, Kachinsky did not think to hire an expert to assist in evaluating the several law enforcement interrogations of Dassey. During his testimony at Dassey's post-conviction hearing, Kachinsky plainly and troublingly admitted that he was not familiar with using an expert in the context of, for example, *Miranda* waiver:

Q: Now, you're also aware that -- that -- in your experience that -- that defense attorneys will hire psychologists to evaluate a -

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370. *Id.* at 23.

371. *Id.* at 24.

372. Joint Appendix, *supra* note 253, at 384.

373. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 127–29. Before meeting with Dassey, Kachinsky made a statement to the media that mentioned "a plea agreement, if one were to be reached, could include [Dassey] testifying against Steven Avery." *Id.* at 127.

374. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 51–53; Transcript of Motion Hearing, *supra* note 2, at 6–7.

375. Joint Appendix, *supra* note 253, at 414.

376. *Id.* at 416.

377. *Id.* at 421.

- a -- a client on the question of whether that client could knowingly and intelligently waive his *Miranda* warnings; correct?

A: I don't think that's true.

Q: You've never seen that happen at a motion to suppress?

A: I -- I think, um -- I don't know that there's a test available where an expert witness can walk into court and render an opinion whether or not somebody is capable of waiving *Miranda*.

Q: It hasn't --

A: I haven't seen that.

Q: It hasn't happened in your --

THE COURT: Hang on a second. The question was: Have you ever seen that?

THE WITNESS: No.

Q: Okay. That's all I need to know. So, again, it wasn't a red flag that you didn't see in this case?

A: No.<sup>378</sup>

Had Kachinsky hired an expert—something Dassey's new defense team did in preparation for the post-conviction hearing—he would have gained some powerful insights. Dr. Richard Leo, an expert in interrogation methods,<sup>379</sup> testified, for example, that several of the interrogators' statements to Dassey on March 1 amounted to impermissible promises of leniency.<sup>380</sup> Dr. Leo, for instance, took issue with repeated assurances to Dassey that, if he is honest with investigators, then he would receive a more positive outcome. Dr. Leo pointed to statements like, "No matter what you did, we can work through that,"<sup>381</sup> and "You know, honesty's the only thing that'll set you free; right?"<sup>382</sup> Dr. Leo characterized those and the several similar statements as follows:

[T]hey're suggesting that, um, being honest, which means telling them what they regard as honest or the truth, um, will

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378. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 60–61.

379. Dr. Leo is a law professor at the University of San Francisco School of Law. *Richard A. Leo*, U. S.F. SCH. LAW, <https://www.usfca.edu/law/faculty/richard-leo> [<https://perma.cc/U9T6-E65S>] (last visited Aug. 14, 2018). Prior to the Dassey post-conviction proceedings, Dr. Leo had analyzed more than 2,000 interrogations. He had likewise authored several books, more than fifty articles, and several book chapters—among other publications. Even prior to his involvement in the Dassey litigation, Dr. Leo's work has regularly been featured in the news media and cited by numerous appellate courts. Affidavit of Dr. Richard A. Leo ¶ 3, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2007).

380. Affidavit of Dr. Richard A. Leo *supra* note 379, ¶¶ 38, 43.

381. Transcript of Post-Conviction Motion Hearing Day 2, *supra* note 335, at 173.

382. *Id.* at 174.

allow, um -- will help him, um, and will allow them to work through it and that they will stand behind him. Um, and he'll get a better deal if he's honest.

Um, and if he's honest, this will be okay. But if he lies, that there -- there will be problems.

So it seems to me that what they are suggesting here is that there will be specific negative consequences, general negative consequences, if he continues to say things that they don't regard as honest. That they don't regard as the truth.

But if he does, he will get help. They will stand behind him. He'll get a better deal. And they even say, "The truth will set you free."<sup>383</sup>

Those parallels aside, Kachinsky's performance was worse than was Tunkey's. Kachinsky, you remember, hired an expert to interrogate his client for the sole purpose of seeking the client's cooperation with the *state*. Tunkey's ineffectiveness never approached that level of ineptitude.

But just like the Supreme Court approved of William Tunkey's conduct in *Strickland*, so too did the state judiciary approve of Len Kachinsky's pretrial representation of Dassey. Following his April 25, 2007, homicide conviction, Dassey was sentenced on August 2 to life in prison for which he will be eligible for parole in 2048.<sup>384</sup> Dassey filed a post-conviction motion in state trial court on August 25, 2009, requesting a new suppression hearing and a new trial on the basis of ineffective assistance of counsel.<sup>385</sup>

The post-conviction claims centered primarily on Kachinsky's conduct, including his poor performance at the suppression hearing.<sup>386</sup> In particular, Dassey argued that Kachinsky's collective actions constituted disloyalty to Dassey and, accordingly, amounted to a conflict of interest that relieved him of proving *Strickland* prejudice.<sup>387</sup>

Following a five-day hearing that took place between January 15–22, 2010, the trial court denied Dassey's requested relief on December 13, 2010.<sup>388</sup> In its written opinion, the court relied on how much time had passed between Kachinsky's representation and the start of Dassey's trial. In particular, said the court, "[b]y the time a jury was selected and Dassey was tried Kachinsky

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383. *Id.* at 175–76.

384. Brief of Defendant–Appellant, *supra* note 3, at 46.

385. *Id.*

386. *Id.*

387. Post-Conviction Memorandum Decision and Order at 7, *State v. Dassey*, No. 06 CF 88 (Manitowoc Cty. Ct. 2010).

388. *Id.* at 32.



was long gone from the case.”<sup>389</sup> Moreover, the court reasoned, the state used very little of the evidence collected from O’Kelly’s May 12 interview and the interrogation of Dassey by Wiegert and Fassbender the next day.<sup>390</sup> The court offered the following additional rationale:

Nothing from O’Kelley’s May 12th interview in which he had Dassey incriminate himself found its way into the trial record. Other than a brief audio clip of a portion of a phone conversation between Dassey and his mother, which the State played without objection in its cross-examination of the defendant, and several questions asked on the cross-examination of Dr. Robert Gordon, nothing from May 13th was introduced at trial. And, the State made little more than passing reference to the May 13th phone call in its closing to the jury.<sup>391</sup>

The court likewise rejected Dassey’s argument that Kachinsky provided deficient performance at the May 4, 2006, suppression hearing. Although Dassey specifically highlighted Kachinsky’s half-hearted cross-examination of the state’s witnesses alongside his concession of viable *Miranda* issues,<sup>392</sup> the court remarkably wrote that Kachinsky “adequately represented Dassey’s interests and cannot be said to have provided ineffective assistance of counsel.”<sup>393</sup>

Dassey appealed the rejection of his state-level post-conviction arguments to the Wisconsin Court of Appeals. In his brief to that court, filed on December 1, 2011, Dassey renewed his contention that Kachinsky provided constitutionally inept representation by trying to force Dassey to plead guilty.<sup>394</sup> He asserted that Kachinsky’s pretrial representation amounted to a conflict of interest, once more pointing to Michael O’Kelly’s May 12 interrogation of Dassey and Wiegert and Fassbender’s further interrogation the next day.<sup>395</sup> Dassey likewise again highlighted Kachinsky’s “curious decisions” at the suppression hearing, including his concession that Dassey was not in custody either on February 27 or March 1.<sup>396</sup> Dassey also, in direct contrast to the trial court’s characterization, highlighted the impact of Dassey’s May 13 phone call to his mother, noting “the State played the climactic moment of the May 13

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389. *Id.* at 9.

390. *Id.*

391. *Id.*

392. *Id.* at 10.

393. *Id.* at 12.

394. Brief of Defendant–Appellant, *supra* note 3, at 48.

395. *Id.* at 57–59.

396. *Id.* at 71.

telephone call—when Brendan told his mother that Steven made him do ‘some of it’—during its cross-examination of Brendan himself.”<sup>397</sup> After emphasizing that the “May 13 telephone call would never have come into existence but for the disloyal actions of Attorney Kachinsky,”<sup>398</sup> Dassey summarized his arguments as follows:

These actions cannot be understood as the efforts of loyal counsel. They are the actions of an attorney who “abandons [his] duty of loyalty and joins the prosecution in an effort to obtain a conviction”—a conviction that, in this case, would have taken the form of a guilty plea.<sup>399</sup>

Calling the trial court’s opinion “a thorough, soundly reasoned decision,”<sup>400</sup> the Wisconsin Court of Appeals on January 30, 2013 took just six paragraphs of an unpublished opinion to reject Dassey’s claim that Kachinsky provided ineffective defense representation.<sup>401</sup> In doing so, the per curiam court faulted Dassey for drawing, “no viable link between Kachinsky’s actions and any demonstrable detriment to him.”<sup>402</sup> Moreover, the court reasoned, “Kachinsky was long gone before Dassey’s trial or sentencing.”<sup>403</sup>

The *Strickland* analysis proffered by the Wisconsin state and appellate courts is deeply concerning for several reasons. To begin with, considering first *Strickland*’s performance prong, both courts confusingly rely on the fact that Kachinsky “was long gone” the time of Dassey’s trial and sentencing.<sup>404</sup> It is unclear, however, why the mere passage of time operates to remedy Kachinsky’s devastating and far-reaching errors. After all, whether he was dismissed before, during, or after Dassey’s trial, there is no changing that Kachinsky’s decision to waive Dassey’s *Miranda*-related arguments forever altered Dassey’s available legal strategies. As Justice Marshall aptly put it in his *Strickland* dissent:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how

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397. *Id.* at 64.

398. *Id.* at 66.

399. *Id.* at 60 (citations omitted).

400. *State v. Dassey*, 2013 WI App 30, ¶ 2, 346 Wis. 2d 278, 827 N.W.2d 928.

401. *Id.* ¶¶ 8–13.

402. *Id.* ¶ 11.

403. *Id.* ¶ 13.

404. *Id.*; Post-Conviction Memorandum Decision and Order, *supra* note 387, at 9.

the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that *evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel*.<sup>405</sup>

Moreover, despite the Supreme Court's clear guidance to use "prevailing professional norms" to evaluate attorney performance,<sup>406</sup> neither the Wisconsin trial court nor appellate court rely on—or even cite—the American Bar Association standards governing attorney conflict.<sup>407</sup> Those standards, according to *Strickland*,<sup>408</sup> serve to assist in the evaluation of an attorney's maintenance of the duty of loyalty,<sup>409</sup> the duty to avoid conflicts,<sup>410</sup> and the duty to advocate the defendant's cause<sup>411</sup>—among others.<sup>412</sup>

The ABA Standards themselves caution that lawyers should not make statements to the media that are substantially likely to prejudice the case.<sup>413</sup> They likewise prohibit statements by attorneys in a criminal matter that unnecessarily heighten public condemnation of a defendant.<sup>414</sup> Those standards each clearly reach and prohibit several of Kachinsky's pretrial comments, including that Dassey was "morally and legally responsible" and that he was "stating the obvious" by concluding that Dassey's confession would lead to a conviction.<sup>415</sup> The Wisconsin state and appellate courts' failure to address ABA standards that directly address and prohibit Kachinsky's conduct serves to further highlight the overwhelmingly deficient analysis provided by those courts.

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405. *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (emphasis added).

406. *Id.* at 688.

407. The Supreme Court in 2012 reiterated the value of American Bar Association standards in evaluating *Strickland* claims. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012) ("Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides.").

408. *Strickland*, 466 U.S. at 688.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* (noting that counsel is also expected to consult with the defendant, keep the defendant informed, and bring sufficient skills and knowledge to allow for the trial to be a reliable adversarial testing process).

413. STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND PUBLIC DISCOURSE § 8-2.1(a)(i) (AM. BAR ASS'N 2018).

414. *Id.* § 8-2.1(a)(ii).

415. Transcript of Post-Conviction Motion Hearing Day 1, *supra* note 7, at 118, 122–23.

Finally, by focusing on the fact that the state relied on very little of Michael O’Kelly’s interrogation at trial,<sup>416</sup> both courts dramatically underestimate O’Kelly’s impact on Dassey’s case more broadly. The point is not that certain evidence obtained by O’Kelly was—or was not—used by the state. Rather, the point is that Dassey’s most important advocate hired an investigator to interrogate and investigate Dassey himself, rather than holistically investigate the case on Dassey’s behalf. The Wisconsin state and appellate courts’ characterizations of that behavior as constitutional is, simply stated, offensive.

A brief consideration of *Strickland*’s prejudice prong uncovers still more concerning problems. As noted, the prejudice portion of *Strickland*’s test requires proof that trial counsel’s errors deprived the defendant of a fair trial; that is, “errors [that] were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”<sup>417</sup> Lower courts have interpreted that language to mean, essentially, that no claim of ineffective assistance of counsel can succeed where evidence of the defendant’s guilt is overwhelming.<sup>418</sup> The case against Dassey was hardly “overwhelming.” Although the trial court acknowledged that Dassey’s March 1 confession was a “pivotal” piece of evidence,<sup>419</sup> it nonetheless somehow concluded that “the quality and quantity of evidence against Dassey is such that there is no reasonable probability that the proceeding would have turned out differently.”<sup>420</sup> Given the absence of physical evidence tying Dassey to Halbach’s killing,<sup>421</sup> it is hard to defend—or even understand—the court’s position.

The decisions by the Wisconsin trial and appellate courts to uphold Kachinsky’s representation of Dassey as constitutional, though upsetting, is sadly typical.<sup>422</sup> Indeed, stories of *Strickland* permitting “the worst lawyering

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416. Post-Conviction Memorandum Decision and Order, *supra* note 387, at 9; *State v. Dassey*, 2013 WI App 30, ¶ 11, 346 Wis. 2d 278, 827 N.W.2d 928.

417. *Strickland*, 466 U.S. at 687.

418. See, e.g., *United States v. Calhoun*, 600 F. App’x 842, 844 (3d Cir. 2015); *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002); *Eaton v. Angelone*, 139 F.3d 990, 994 (4th Cir. 1998); *United States v. Alex Janows & Co.*, 2 F.3d 716, 721–22 (7th Cir. 1993).

419. Post-Conviction Memorandum Decision and Order, *supra* note 387, at 20.

420. *Id.* at 22.

421. *Dassey v. Dittmann*, 860 F.3d 933, 938 (7th Cir. 2017) (noting that “the State had failed to find any physical evidence linking [Dassey] to the crime”), *overruled on other grounds*, 877 F.3d 297 (7th Cir. 2017) (en banc); Transcript of Trial Day 5, *supra* note 3, at 103.

422. Following his state appeals, Dassey would pursue federal habeas grounds related to Kachinsky’s performance, though not precisely grounded in *Strickland*. Those efforts likewise failed and the federal courts unfortunately never had the opportunity to evaluate Kachinsky’s pretrial representation of Dassey on pure *Strickland* grounds. See *Dassey v. Dittman*, 201 F. Supp. 3d 963, 991 (E.D. Wis. 2016) (“Dassey never asked this court to consider whether Kachinsky rendered ineffective assistance under *Strickland*.”).

to pass muster” abound.<sup>423</sup> Lower courts have, for instance, relied on *Strickland* to uphold defense attorney conduct that includes sleeping through portions of a trial,<sup>424</sup> remaining totally silent during the proceedings,<sup>425</sup> mental illness,<sup>426</sup> alcohol use,<sup>427</sup> and drug use.<sup>428</sup> With those results in mind, *Strickland* has unsurprisingly endured criticism from an array of sources.<sup>429</sup>

That criticism has done little to effectuate meaningful change. *Strickland* remains useless as a tool for improving defense attorney performance just as it is likewise worthless for holding bad defense lawyers accountable.<sup>430</sup> At best, *Strickland* captures only the most extreme defense attorney behavior.<sup>431</sup> Law

423. William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 160 (1995); accord *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (“Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’”).

424. *McFarland v. State*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996).

425. *United States v. Sanchez*, 790 F.2d 245, 248 (2d Cir. 1986).

426. *Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987).

427. *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989).

428. *Young v. Zant*, 727 F.2d 1489, 1492–93 (11th Cir. 1984); *People v. Badia*, 552 N.Y.S.2d 439, 440 (App. Div. 1990).

429. See, e.g., Robert M. Andelman, *Ineffective Assistance of Counsel Claims Under the Wisconsin Constitution*, WIS. LAW., Feb. 1994, at 14, 17; Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1352 (1995); Geimer, *supra* note 423, at 138–47; Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 67 (1986); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1272–81 (1986); Alan Berlow, *Lose That Lawyer*, SLATE (June 3, 2008, 4:04 PM), <https://slate.com/news-and-politics/2008/06/do-defendants-in-georgia-have-any-right-at-all-to-competent-representation.html> [<https://perma.cc/554P-YV8Y>].

430. For a representative sample of incompetent defense attorney behavior that *Strickland* failed to capture, see *Escobedo v. Lund*, 760 F.3d 863, 867 (8th Cir. 2014); *LeCroy v. United States*, 739 F.3d 1297, 1315–16 (11th Cir. 2014); *Rourke v. State*, 912 N.W.2d 311, 313 (N.D. 2018); *Anderson v. State*, 454 S.W.3d 212, 217–18 (Ark. 2015).

431. *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (attorney failing to investigate and present substantial mitigating evidence during the sentencing phase of capital murder trial); *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (defense counsel sleeping/being unconscious during trial); *People v. Miera*, 183 P.3d 672, 678–79 (Colo. Ct. App. 2008) (defense counsel representing one of the prosecution’s witnesses in a different case closely linked to the one at bar); *Helmedach v. Comm.’r of Correction*, 189 A.3d 1173, 1179–80 (Conn. 2018) (defense counsel failing to communicate the prosecution’s fourth—and most favorable—plea deal to defendant before she testified in a murder trial); *United States v. Velazquez*, 197 F. Supp. 3d 481, 485–86 (E.D.N.Y. 2016) (defense counsel failing to develop alibi evidence, failing to show the government’s proposed exhibits to defendant, which would have led to counsel learning of favorable evidence, and pursuing a line of questioning

schools must therefore make a specific curricular change: bring *Strickland v. Washington* into the investigative criminal procedure classroom. Although *Strickland* is a major point of emphasis in the adjudicative criminal procedure law school course, the investigative criminal procedure courses often omit *Strickland*.<sup>432</sup> That considerable omission does a disservice to law students nationwide given the prevalence of the investigative criminal procedure course in law school curricula alongside its presence on the bar examination.<sup>433</sup> Accordingly, many students may never learn about *Strickland* prior to graduating. That is problematic to say the least; after all, nothing in the investigative criminal procedure course matters unless students commit to begin a good lawyer. It really is that simple.

## V. CONCLUSION

More than nineteen million viewers in the United States watched *Making a Murderer* in just the first thirty-five days after its release in 2016.<sup>434</sup> A video

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with a corroborating witness that called the witness's credibility into question); *Moore v. Beard*, 42 F. Supp. 3d 624, 643–44 (M.D. Penn. 2014) (defense counsel failing to properly interview and introduce an exculpatory witness and failed to impeach the prosecution's key witness); *Ex parte Overton*, 444 S.W.3d 632, 641 (Tex. Crim. App. 2014) (defense counsel failing to review expert deposition and introduce medical testimony that would have contradicted most of the state's case during capital murder trial); *Maya v. State*, 932 S.W.2d 633, 636 (Tex. Ct. App. 1996) (defense counsel representing both a husband and wife and failed to advise the defendants of the conflict and obtain a waiver of conflict-free counsel).

432. The investigative criminal procedure courses in law schools nationwide most commonly focus on search and seizure (Fourth Amendment), confessions (Fifth/Sixth Amendments), and lineup procedures (Sixth/Fourteenth Amendments). See, e.g., *Criminal Procedure: Investigation*, STAN. L. SCH., <https://law.stanford.edu/courses/criminal-procedure-investigation/> [<https://perma.cc/M4T4-5XWH>] (last visited Aug. 24, 2018) ("This course, 'Criminal Investigation,' covers police investigation in the form of searches and seizures, interrogations, lineups, and undercover operations, and hence examines the Fourth and Fifth (and, to a limited extent, the Sixth) Amendment rules regulating the police in these endeavors."); *Criminal Procedure: Investigation*, PACE L. SCH., <https://law.pace.edu/courses/criminal-procedure-investigation> [<https://perma.cc/WQ7R-EYQB>] (last visited Aug. 24, 2018) ("A careful examination is undertaken of the contours of the Fourth, Fifth, and Sixth Amendments as they relate to searches and seizures, the eliciting of confessions, and identification procedures."); *Criminal Procedure: The Investigative Process*, CATHOLIC U. AM., <https://www.law.edu/Announcements/2018-2019/Course-Descriptions.cfm> [<https://perma.cc/J7RZ-Q283>] (last visited Aug. 24, 2018) ("All sections of the course focus primarily on issues of constitutional criminal procedure relating to the Fourth Amendment (search and seizure), Fifth Amendment (custodial interrogations), and Sixth Amendment (interrogation and identification), and also include an examination of the defense of entrapment.").

433. See *supra* notes 17–18 and accompanying citations.

434. Jason Lynch, *Over 19 Million Viewers in the U.S. Watched Making a Murderer in its First 35 Days*, ADWEEK (Feb. 11, 2016), <https://www.adweek.com/tv-video/over-8-million-viewers-us-watched-making-murderer-its-first-35-days-169602/> [<https://perma.cc/B7JG-SM7R>].

of Brendan Dassey's March 1, 2006, confession was even included in the petition for certiorari filed on his behalf earlier this year—a rare occurrence.<sup>435</sup> It is therefore difficult to overstate the popularity—and importance of Brendan Dassey's case. The popularity, though, offers to law students an important and possibly unprecedented learning opportunity in the investigative criminal procedure classroom.

Laura Nirider,<sup>436</sup> along with her colleagues at the Center on Wrongful Convictions of Youth,<sup>437</sup> have represented Dassey in the appeals process since 2008.<sup>438</sup> She recently wrote that interrogations like Dassey's alongside false confessions more generally are happening “with disturbing regularity.”<sup>439</sup> She added that law schools have a role to play in the false confession conversation:

It's time for law schools to do something about it.

In fact, I'd like to suggest that law schools—national stewards of the noble profession of lawyering, responsible for producing the next generation of lawyer–citizens who will shape and change the law to come—are well situated to do something about problematic gaps in the law just like this one.<sup>440</sup>

I agree with her. Strongly. With Dassey's petition denied,<sup>441</sup> using Dassey's case as a teaching tool seems all the more important. After all, forthcoming Supreme Court guidance seems unlikely given that the Court has not heard a juvenile interrogation case since 1979.<sup>442</sup>

435. Tony Mauro, *Watching 'Making a Murderer' at the US Supreme Court*, NAT'L L.J. (June 13, 2018, 6:20 PM), <https://www.law.com/nationallawjournal/2018/06/13/watching-making-a-murderer-at-the-u-s-supreme-court/> [https://perma.cc/S998-KSFQ].

436. Clinical Assistant Professor & Center on Wrongful Convictions of Youth Project Co-Director, Northwestern Pritzker School of Law.

437. *Center on Wrongful Convictions of Youth: Bluhm Legal Clinic*, NW. PRITZKER SCH. LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/> [https://perma.cc/CL4A-Y8GD] (last visited June 25, 2018).

438. *A Conversation with Steve Drizin and Laura Nirider on "Making a Murderer"*, NW. PRITZKER SCH. LAW (Mar. 1, 2016), <http://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=793> [https://perma.cc/862Q-A7LK].

439. Laura Nirider, *False Confessions, Legal Education, and the Brendan Dassey Case*, FAC. LOUNGE (Apr. 12, 2018, 3:17 PM), <http://www.thefacultylounge.org/2018/04/false-confessions-legal-education-and-the-brendan-dassey-case.html> [https://perma.cc/3TKM-S2VZ].

440. *Id.*

441. *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018), <https://www.supremecourt.gov/docket/docketfiles/html/public/17-1172.html> [https://perma.cc/D55G-4S8A].

442. *Fare v. Michael C.*, 442 U.S. 707 (1979).